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Supreme Court of the United States

OCTOBER TERM, 100 1950 195

No. 454 4

GEORGIA BAILROAD & BANKING COMPANY,
APPELLANT,

U8.

CHARLES D. REDWINE, STATE REVENUE COMMISSIONER

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

FILED NOVEMBER 12, 1949.

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OCTOBER TERM, 1949

No. 454

GEORGIA RAILROAD & BANKING COMPANY, APPELLANT,

228.

CHARLES D. REDWINE, STATE REVENUE COMMISSIONER

APPEAL FROM THE UNITED STATES DISTRICT-COURT FOR THE ** NORTHERN DISTRICT OF GEORGIA

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, NEW-NAN DIVISION

Civil Action No. 185

GEORGIA RAILEOAD & BANKING Co., Plaintiff,

VS.

CHARLES D. REDWINE, STATE REVENUE COMMISSIONER, Defendant

COMPLAINT-Filed February 14, 1949

1

Plaintiff, Georgia Railroad & Banking Company, is a railroad corporation created by the laws of the State of Georgia, with its principal office in Richmond County, Georgia.

 $\mathbf{2}$

Defendant, Charles D. Redwine, is a resident and inhabitant of Fayette County, Georgia, within the Newnan Division of the Northern District of Georgia.

3

Defendant is the State Revenue Commissioner of the State of Georgia.

4

This Honorable Court has jurisdiction of this action for the reason that the action is an ancillary and supplemental action to enforce and carry out the previous decree of this Court, as hereinafter more fully appears, and for the reason that the action arises under the Constitution of the United States, Article I, Section 10, and the Fourteenth Amendment to the Constitution of the United States, Section 1, as hereinafter more fully appears, and also arises under the laws of the United States in that the effect of decrees entered by Courts of the United States is involved, as hereinafter more fully appears. The matter

[fol. 2] in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.

5

Plaintiff was chartered as "Georgia Railroad Company" by special Act of the General Assembly of Georgia approved December 21, 1833. Said Act appears in Georgia Laws 1833, page 256 et seq. Said Act is incorporated herein by reference as fully as to the same extent as if herein set out in full.

6

The name of plaintiff corporation was changed to "Ceorgia Railroad & Banking Company" by the Act of the General Assembly of Georgia assented to December 18, 1835. By Act approved December 25, 1837, plaintiff was authorized to extend its line westward to the Chattahoochee River. Said Act approved December 48, 1835 (Georgia Laws 1835, page 180), and said Act approved December 25, 1837 (Georgia Laws 1837), page 212), are incorporated herein by reference as fully and to the same extent as if herein set out in full.

7

Pursuant to said Acts plaintiff raised capital by offering its stock for subscription and constructed a main line from Augusta, Georgia, to Atlanta, Georgia, a distance of 170.71 miles, more or less, and the Athens branch from Union Point, Georgia, to Athens, Georgia, a distance of 39.42 miles, more or less. Said lines are hereinafter referred to as the "charter tax lines."

8

Plaintiff has subsequently acquired other lines, which are not subject to the special provisions for taxation in said Act of 1933. Said lines are not involved in this litigation.

0

On May 7, 1881, plaintiff, in the exercise of the powers conferred upon it by its said charter, leased its railroad properties to William M. Wadley for the term of 99 years

[fol. 3] from April 1, 1881, and Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Co. are said Wadley's successors in interest to said lease.

10

Said Act of 1833 provides, among other things:

"The stock of said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of said railroads or any one of them; and after that shall be subject to a tax not exceeding one-half percent per annum on the net proceeds of their investment."

11

Said Act of 1833, quoted in paragraph 10 hereof, is a valid and binding contract between the State of Georgia and plaintiff and limits the taxation of said charter tax lines and all appurtenances thereof to a tax of one-half percent of the net earnings of said lines and prohibits any taxation in excess thereof, and said contract cannot constitutionally be impaired by any law of Georgia. It has been repeatedly so adjudicated in the cases of:

City Council of Augusta v. Georgia Railroad &.

Banking Co., 26 Ga. 651;

State of Georgia v. Georgia Railroad & Banking Co.,

54 Ga. 423;

Georgia Railroad & Banking Co. v. Wright, 132 Fed. 912; Modified and Affirmed by the Supreme Court in 216 U. S. 420;

Louisville & Nashville Railroad Co. v. Wright, 236

U. S. 674.

12

By the Act approved March 9, 1945, (Georgia Laws 1945) page 14, the General Assembly of Georgia enacted, for submission to the people, a constitutional amendment to the Constitution of Georgia, providing, among other things, in Article I, Section III, Paragraph III thereof:

"All exemptions from taxation heretofore granted in corporate charters are declared to be henceforth null and void."

Said constitutional amendment containing the provision quoted in paragraph 12 hereof was ratified by the requisite vote of the voters of Georgia.

14

Acting pursuant to said amendment to the Constitution of Georgia, defendant is threatening to, and unless restrained and enjoined by this Court will, assess against said charter tax lines of plaintiff ad valorem taxes for state, county, school district and municipal taxes for the year 1939 and all subsequent years at the full rate of ad valorem tax imposed by the State of Georgia and at the full rate of ad valorem tax assessed by every county, school district and municipality through which said charter tax lines run, and will proceed against plaintiff to collect said taxes under some or all of the procedures set out in Chapters 92-61, 92-26, 92-27, and 92-28 of the Georgia Code of 1933, and the Act approved January 18, 1938 (Georgia Laws, Extra Session, 1937-1938, page 77 et seq.), as amended by the Act approved February 17, 1943 (Georgia Laws 1943, page 204 et seq.

15

Said amendment of 1945 to the Constitution of Georgia, set out in paragraph 12 hereof, as applied to plaintiff, is unconstitutional and void, for the reason that said amendment, if valid, will impair the obligation of said contract between the State of Georgia and plaintiff, contrary to Sec. 10 of Article I of the Constitution of the United States and for the reasons that said amendment, if applied to this plaintiff, will deprive this plaintiff of its property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

16

Said laws of Georgia as set out in paragraph 14 thereof, if applied against plaintiff so as to subject the charter tax lines of plaintiff to ad valorem taxes as threatened by deform 5 fendant, are and will be unconstitutional and void as against plaintiff for the reasons that said laws will impair the obligation of said contract between the State of Georgia and plaintiff, contrary to Sec. 10 of Article I of the Constitu-

tion of the United States, and on the grounds that said laws will deprive plaintiff of its property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States.

17

In the case of Georgia Railroad & Banking Co. v. William A. Wright, Comptroller General of the State of Georgia, No. 1192, in equity, in this Honorable Court, this Honorable Court, on July 3, 1907, entered the following decree, to-wit:

"This cause coming on to be heard upon the bill of complaint of the Georgia Railroad & Banking Company vs. William A. Wright, Comptroller General, and amendments thereto and the exhibits to the same, and the answer and amendment thereof interposed thereto by the defendant, William A. Wright, Comptroller General, and upon the answer of the defendant Wilkes County, and upon the answer of the defendant Taliaferro County, it is

Considered, ordered and adjudged by the court that the Charter of the complainant, to wit: the Act of the Legislature of Georgia of December 21st, 1833, and various other Acts of said Legislature, passed prior to the 1st day of January, 1863, is a valid and binding contract between the State of Georgia, and complainant

the Georgia Railroad & Banking Company;

"That the said Charter cover complainant's main railroad between the cities of Augusta and Atlanta, in said State one hundred and seventy-one miles; its branch railroad between Barnett and the City of Washington in said State, eighteen miles; and its branch railroad between Union Point and the City of Athens, said State, forty miles; and all of the appurtenances of said railroad including their rolling stock; also complainant's franchise to be a corporation and other franchises without reference to the valuation of all of said property, which valuation it is admitted exceeds by four millions of dollars the nominal value of the capital stock of said Company, said excess being produced by natural increase in the value of said property and by renewals, alterations and betterments of the same from time to time by the complainant. The said Charter provides a system of taxation, for said property exclusive of all other taxation, to wit:—one half of one per cent. of the net earnings of said property.

"That all property of complainant other than that [fol. 6] above specified including so much of said property as is represented by four hundred and forty shares of stock subscribed under the Act of Oct. 5, 1868, is liable to taxation under the general tax laws of the State of Georgia.

"It is further ordered, adjudged and decreed that defendant be perpetually enjoined from levying and collecting any taxes, State, county or municipal from said complainant not in accordance with this decree."

"This the 3rd day of July, 1907."

Said cause was appealed to the Supreme Court of the United States and the Supreme Court, on February 21, 1910, issued the following mandate:

by this Court that the decree of the said Circuit Court in this cause be and the same is hereby modified so as to exclude the eighteen miles constituting the Washington Branch Railroad, but in all other respects be, and the same is hereby, affirmed, the costs of this appeal to be divided between Wright, Comptroller General, and The Georgia Railroad & Banking Company.

February 21, 1910."

The mandate of the Supreme Court of the United States was, on May 23, 1910, made the judgment of this Honorable • Court.

18

The record of said case in this Honorable Court, and in the Supreme Court of the United States, is incorporated herein by reference as fully and to the same extent as if herein set out in full.

19

By the Act of the General Assembly of Georgia approved January 18, 1938 (Georgia Laws 1937-1938, page 77 et seq.), the powers, duties and functions of the Comptroller General of Georgia in regard to ad valorem taxation were transferred to the State Revenue Commissioner; and defendant is the successor in office of said William A. Wright, in regard

to all matters relating to ad valorem taxation of railroad companies.

Said decree in this Honorable Court as modified and affirmed by the Supreme Court of the United States con[fol. 7] clusively adjudicates that said Act of the Legislature of Georgia of December 21, 1833, is a valid and binding contract between the State of Georgia and plaintiff, and that said contract covers the property of plaintiff described in said decree as modified by the Supreme Court of the United States, that said charter provides a system of taxation for said property exclusive of all other taxation, to-wit: one-half of one percent of the net earnings of said property, and said decree is res judicata as to said matters and estops defendant herein from attempting to levy or collect any ad valorem taxes on the charter tax lines of plaintiff other than as permitted in said decree.

21

Said decree further perpetually enjoins the defendant therein from levying and collecting any taxes, state, county or municipal, from plaintiff not in accordance with said decree; and defendant herein, as successor in office of the defendant therein, is bound and enjoined by said decree.

22

Plaintiff further shows that in the case of State of Georgia v. Georgia Railroad & Banking Co., in the Superior Court of Fulton County, Georgia, which case was appealed to the Supreme Court of Georgia and there affirmed in the case of State of Georgia v. Georgia Railroad & Banking Co., 54 Ga. 423, it was also adjudicated that the charter of plaintiff was an irrevocable contract between the State of Georgia and plaintiff which exempts its charter tax lines and appurtenances thereto from tax except as provided in said charter, and that any law of Georgia which attempts to impose any other or different tax thereon is unconstitutional and void; and defendant, as a subordinate official of the State of Georgia, the plaintiff therein, is bound by said adjudication and is estopped by said adjudication to deny that said charter is an irrevocable contract preventing the taxation of [fol. 8] plaintiff except as therein provided; and the same is res judicata.

Plaintiff further shows that even if said amendment to the Constitution of Georgia of 1945 is valid and effective to annul and void the exemption from taxation set out in plaintiff's charter, which plaintiff denies, even so, said constitutional provision in terms purports to be and is prospective in operation only and applies only to taxes accruing after the adoption thereof and does not justify the imposition of any taxes prior to the ratification thereof, as attempted by defendant.

24

Plaintiff has paid all of the taxes due by it on its property, other than said charter tax lines and the necessary appurtenances thereto, and has paid tax at the rate of ½% per annum on net proceeds from said charter tax lines and the necessary appurtenances thereto.

25

Plaintiff does not know the exact amount of tax defendant proposes to assess against plaintiff but plaintiff shows that the amount that defendant proposes to assess against plaintiff will be several hundred thousands of dollars.

26

Plaintiff has complied with all conditions precedent to its right to said tax exemption set out in said Act of 1833 and has complied with all the conditions precedent to bringing this action.

27

Unless the threatened acts of defendant are restrained and enjoined by this Honorable Court, plaintiff will suffer irreparable injury.

28

Plaintiff does not have any plain, speedy or efficient [fol. 9] remedy in the Courts of Georgia.

29

Plaintiff does not have any adequate remedy at law.

- (1) That process be issued and served on the defendant as provided by law;
- (2) That defendant be temporarily restrained and temporarily and permanently enjoined from assessing or collecting any ad valorem tax against said charter tax lines of plaintiff and the necessary appurtenances thereto, other than said tax of ½% on the net proceeds therefrom as provided in said Act of 1833;
- (3) That the Court adjudicated that the threatened acts of defendant are and will be a violation of said decree of this Honorable Court as modified and affirmed by the Supreme Court of the United States and that the threatened acts of defendant are and will be a contempt of this Honorable Court.
- (4) That plaintiff have such other and further relief to which it may be entitled in the premises.

Spalding, Sibley, Troutman & Kelley, Robert B. Troutman, Furman Smith, Attorneys for Plaintiff, 434 Trust Company of Georgia Bldg., Atlanta, Georgia.

Duly sworn to by Charles H. Phinizy. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 10] IN UNITED STATES DISTRICT COURT

Answer and Defenses of Defendant-Filed March 7, 1949

First Defense

The complaint fails to state a claim or cause of action against defendant upon which relief can be granted.

Second Defense

The complaint fails to set forth any ground or grounds for equitable relief, and shows on its face that plaintiff has an adequate and complete remedy at law.

Third Defense

The complaint is premature and shows on its face that no action has been taken which could justify the grant of equitable relief.

Fourth Defense

The complaint shows on its face that the same is a suit against the State, and that the State has not consented to be sued herein.

Fifth Defense

On July 16, 1948, the Supreme Court of Georgia in the case of Musgrove vs. Georgia Railroad and Banking Company, No. 16178, rendered a decision and judgment based on a similar complaint brought by the present petitioner against M. E. Thompson as State Revenue Commissioner, later substituting Glenn S. Phillips who succeeded Thompson as State Revenue Commissioner, and finally Downing Musgrove who succeeded Phillips in that office, seeking to prevent the Commissioner of Revenue from making an assessment against plaintiff's railroad for ad valorem taxes, which plaintiff alleged was exempted from the payment of such taxes by virtue of its charter granted in 1833 and subsequently amended. Defendant says that since the same action brought by the same petitioner against the same public office has been adjudicated by the Supreme [fol. 11] Court of Georgia as a suit against the State without the consent of the State, that the present suit is res judicata, and that plaintiff is estopped by that judgment from proceeding in this Honorable Court to raise again the same identical issue. The judgment of the Supreme Court of Georgia was subsequently affirmed in effect by the United States Supreme Court when that Court refused to grant a writ of certiorari. Defendant pleads both of these decisions and judgments as a defense to the present case, and incorporates the same herein by reference as fully and to the same extent as if herein set out in full. A portion of the Supreme Court of Georgia ruling in reference to this matter cited in 49 S. E. 2nd, page 26, and quoted from page 27, is as follows:

"Held: Whether the petition be construed as one brought against the defendant in his official capacity or in his individual capacity, it was in substance and effect an action against the State and was not maintainable, the State not having concented to be thus sued."

On page 35 of the above decision, the Supreme Court of Georgia held as follows:

"1. The plaintiff does not claim that the State has in fact consented to be sued in this case, but, as to this phase, it simply contends that the suit is against the defendant as an individual, and is therefore not a suit The suit was originally brought against the State. against the defendant in his representative capacity as State Revenue Commissioner of the State of Georgia' but this express denomination was later stricken by amendment. Whether or not, in view of other references to the defendant as an official which remained in the petition after such amendment, it could be said that the petition as amended is in name a suit against [fol. 12] the defendant solely in his individual capacity, is immaterial, if upon a consideration of the petition as a whole, including the relief which it seeks at appears that the action is in reality a suit against the State, brought without its consent. 'Where a suit is brought against an officer or agency of the State with relation to some matter in which the defendant represents the State in action and liability, and the State, while not a party to the record, is the real party against which relief is sought, so that the judgment for plaintiff, although nominally against the named defendant as an individual or entity distinct from the State, will operate to control the action of the State or subject it to liability, such is in effect one against the State.' The statement just quoted accords with the generally accepted rule, and we are of the opinion that the present suit is an action against the State within this ruling."

Sixth Defense

The complaint shows on its face that this Honorable Court is without jurisdiction over the defendant, since the case as laid seeks to allege a cause of action against the State, and the State has not consented to be sued in the premises.

Seventh Defense

The complaint is defective in law and equity, in that plaintiff seeks the aid of this Honorable Court in protecting its interest alleged to have been created by virtue of a contract with the State of Georgia entered into by legislative enactment in 1833 and amended in 1835, but nowhere in the complaint does plaintiff allege that it has complied with the provisions of the alleged contract. Defendant states that until and unless plaintiff will allege a compliance on [fol. 13] its part with the terms of the alleged contract, it would certainly have no standing in a court of equity against the State of Georgia or its duly authorized officials.

Eighth Defense

Defendant admits paragraphs 1, 2 and 3 of the complaint.

Ninth Defense

Defendant denies paragraph 4 of the complaint.

Tenth Defense

Defendant says that paragraphs 5 and 6 of the complaint require no answer in that said laws referred to therein speak for themselves. Defendant however, does deny the implication contained in these paragraphs that any of these laws granted a binding exemption from taxation to plaintiff. For further answer, defendant says that none of the laws referred to authorized an exemption from taxation as contended for by plaintiff in this suit.

Eleventh Defense

For want of sufficient information, defendant can neither admit nor deny the allegations contained in Paragraph 7 of the complaint, but requires strict proof thereof.

Twelfth Defense

Defendant admits paragraphs 8, 9 and 10 of the complaint, except that defendant denies that any of the lines of plaintiff are entitled to a special tax exemption.

Thirteenth Defense

Defendant denies paragraph 11 of the complaint.

Fourteenth Defense

Defendant admits paragraphs 12 and 13 of the complaint.

Fifteenth Defense

Defendant demes paragraph 14 of the complaint as alleged, and for further answer states that as Commissioner of Revenue of the State of Georgia, he has in the past and will continue in the future to follow all the laws in reference [fol. 14] to the discharge of his official duties. Defendant denies the right of this Honorable Court to issue an injunction against the State of Georgia based solely upon an alleged threat or mental reservation pertaining to plaintiff. An assessment has not been issued and no action, legal or otherwise, has presently been instituted against plaintiff and the future conduct and action of the State of Georgia will be in accordance with law.

Sixteenth Defense

Defendant denies paragraphs 15 and 16 of the complaint.

Seventeenth Defense

Defendant denies paragraph 17 of the complaint, and, states that the case of Georgia Railroad and Banking Company vs. William A. Wright, Comptroller General of the State of Georgia, No. 1192, decided by this Honorable Court on July 3, 1907, is not res judicata of the issues now presented in this case. It is premature on the part of plaintiff to assume the legal points to be raised by the State of Georgia in any future proceedings, and to attempt to have this Honorable Court adjudicate that such issues which may be presented by the State of Georgia will be identical with those presented in the case decided on July 3, 1907, by this Honorable Court. No issue was presented in that case as to whether the proceeding was directed against the State of Georgia or against William A. Wright as an individual. If such suit was directed against Wright as an individual, then clearly it would not bind a different person or the State of Georgia in a subsequent proceeding under different facts for a different taxable year. Defendant incorporates herein by reference the entire decision, judgment and record of this Honorable Court in the present case above referred to. Defendant likewise states that the mandate issued by the United States Supreme Court

of February 21, 1910, which in part sustained the lower court, is not res judicata or an estoppel against future proceedings which may be instituted by the State of Georgia involving additional or different facts, different tax years or different parties.

[fol. 15] . Eighteenth Defense

Defendant admits paragraph 18 of the complaint.

Nineteenth Defense

Defendant denies paragraph 19 of the complaint as alleged, and states that the duties of the present defendant are defined by law and those functions formerly vested in the Comptroller General and which have been transferred to the Commissioner of Revenue, are plainly set forth in the laws of this State.

Twentieth Defense

Defendant denies paragraph 20 of the complaint.

Twenty-first Defense

Defendant denies paragraphs 21, 22, 23 and 24 of the complaint.

Twenty-second Defense.

For want of sufficient information defendant can neither admit nor deny the allegations of paragraph 25 of the complaint, but requires strict proof thereof. Since plaintiff's present action is premature, it is to be expected that plaintiff could not know the amount of any proposed assessment which may be assessed against it.

Twenty-third Defense

Defendant denies paragraphs 26, 27, 28 and 29 of the complaint.

Wherefore, defendant prays that this Answer and the several defenses thereof be sustained on each and every ground, and that the complaint be dismissed with the cost of this proceeding assessed against plaintiff.

Eugene Cook, Attorney General; Claude Shaw, Deputy Assistant Attorney General; Martin Peabody, Assistant Attorney General.

[File endorsement omitted.]

[fol. 16] Duly sworn to by Charles D. Redwine. Jurat omitted in printing.

GEORGIA,

40

Fulton County:

I, Claude Shaw, Deputy Assistant Attorney General, do hereby aver that I have this day mailed a copy of the foregoing Answer and Defenses to Spalding, Sibley, Troutman and Kelly, at their office address, 434 Trust Company of Georgia Building, Atlanta, Georgia, under proper postage.

This 7th day of March, 1949.

Claude Shaw, Deputy Assistant Attorney General.

[fol. 17] IN UNITED STATES DISTRICT COURT

AMENDMENT TO ANSWER AND MOTION TO DISMISS—Filed April 11, 1949

Now comes the defendant, Charles D. Redwine, State Revenue Commissioner, and with leave of court first obtained, amends his original answer and motion to dismiss, by adding the following defenses thereto:

Twenty-fourth Defense

Defendant shows that the petition should be dismissed for the following reasons, to-wit:

I

(a) The judgment and decree sought to be enforced is void and of no effect insofar as to be binding on the defendant, Charles D. Redwine, Commissioner of Revenue of the State of Georgia. Neither said Charles D. Redwine nor the State of Georgia was a party in the action upon which the judgment sought to be enforced was based: Neither appeared and defended said action nor waived the right to be heard, and hence, neither the Circuit Court rendering the judgment nor the United States Supreme Court to which it was appealed, had any jurisdiction to render any judgment binding on the said Charles D. Redwine nor the State of Georgia.

- (b) The State of Georgia not being a party to said action and not having appeared and defended, neither of the foregoing courts had any power to adjudicate and declare the liabilities of the State of Georgia under the alleged contract which plaintiff claimed it had entered into with the State of Georgia.
- (c) Under the ruling of the United States Supreme Court on appeal from the judgment rendered in the Federal court, its judgment as to taxes for one year was not res judicata as to taxes for other years. Hence, the court rendering the decree had no power to enjoin the collection of any taxes other than for the year 1903 which the defendant at that time was attempting to assess, and hence said judgment and [fol. 18] decree could not validly prohibit the attempt to assess and collect taxes for future years, taxes for each year being a different cause of action.
- (d) The decree sought to be enforced against this defendant itself, construed under the Supreme Court ruling, does not attempt to enjoin Wright, the defendant therein, from assessing and collecting taxes for future years, but merely enjoined him perpetually from attempting to assess and collect taxes for the year 1903 described in the petition, and which he was then attempting to collect.
- (e) The construction of said decree as enjoining Wright and his successors in office now sought by the plaintiff would render the judgment void, because it would not follow the ruling of the United States Supreme Court made on appeal in which it held that judgment for taxes for one year is not resejudicate as to other years, and that being the law of the case, this court should not extend the decree over and beyond the law of the case as set forth in the decision of the United States Supreme Court.
- (f) This action is brought on the erroneous theory that the original action against Wright, the defendant in the judgment sought to be enforced, was brought against him in his official capacity as Comptroller General, but the record of said case shows that it was against Wright in his individual capacity, and hence the judgment could not be binding against anyone except Wright himself, and not being against Wright in his official capacity, the decision does not affect his successor in office which defendant is not, defend-

ant's office being an entirely new and distinct office separate from and having no connection with the office of Comptroller-General.

(g) The present action is against Charles D. Redwine in his individual capacity and it seeks to engraft a judgment rendered against another party in the other party's individual capacity, and seeks to enjoin a cause of action different from that in said judgment, that is, taxes for years other than those on which the original judgment was granted.

[fol. 19] Twenty-Fifth Defense

. Defendant says that said petition should be dismissed. and its prayers denied for the reason that plaintiff is atotempting to claim benefits from a charter granted by the State to it without complying with the requirements of the charter and performing the duties placed by said charter upon said plaintiff, and by reason of said failure on the part of the plaintiff to comply, it is guilty of a breach of contract which precludes it from demanding perpetual rights and privileges granted in said charter. Defendant shows in part the breach of contract by plaintiff: The Act of 1833 creating the Georgia Railroad Company required that corporation to construct a branch of railroad from the main line to Eatonton, Georgia, and plaintiff has never built this line. The building of this branch railroad was one of the considerations of the granting of the charter creating the corporation, and the plaintiff has no right to maintain this action until said railroad has been built.

Twenty-Sixth Defense

Defendant says further that said petition should be dismissed and its prayers be denied insofar as it applies to that portion of the railroad running from Madison, Mergan County, Georgia, to Atlanta, Fulton County, Georgia, a distance of 67 miles, because that portion was built under the provisions of the Act of 1837, and the construction was allowed by the State as a privilege, and so stated in the Act, and no tax exemption was contracted therein. The only wording in said Act which could possibly be construed as in any way approaching the tax exemption was the granting in said Act of all the immunities in the construc-

tion of the railroad as was contained in the previous Acts. The only immunity, in the construction granted in the previous Acts was the immunity from injunction. The authority to build this 67 miles being a mere privilege, the State was authorized to withdraw at will any tax exemption which might have been included therein.

[fol. 20] Twenty-Seventh Defense

Defendant says further that said petition should be dismissed and the prayers therein denied for the reason that the portion of Section 15 of the Act of 1833 relied on by plaintiff is repugnant to and in conflict with the Constitution of the State of Georgia of 1798, which Constitution was in force at the time of said Act, to-wit:

- 1. The General Assembly of Georgia at that time had no power to grant perpetual tax exemption to any person, or to bind all future legislatures from changing any law enacted, and contract away the sovereign power of taxation of the State of Georgia so that the people of Georgia could never recover this sovereign power.
- 2. The said portion of Section XV is in conflict with Section XXII, Article I of the Constitution of 1798, which reads as follows:

"The General Assembly shall have power to make all laws and ordinances which they shall deem necessary and proper for the good of the State which shall not be repugnant to this Constitution."

because this provision of the Constitution limits the General Assembly to the passage of those laws which are not repugnant to this Constitution, either according to the letter or according to the spirit. An alienation of the sovereign power of the State is repugnant to the sovereign rights of the people of Georgia which was retained by the Constitution.

3. Said Section of the Act is further repugnant to said Section of the Constitution because said section, if held valid, would forbid all future legislatures from eracting any law under the provisions of said section of the Constitution withdrawing the grant of said element of sovereignty over a part of the territory of Georgia because under said

provision of the Constitution the General Assembly of any year had power to enact any law coming under the provisions of said Section of the Constitution, unhampered by [fol. 21] what a preceding legislature had done, and the legislature was not forbidden the right to levy tax on all property within its jurisdiction.

- 4. The said portion of Section XV is further repugnant to the Constitution of 1798 and in conflict with Section XXIII of Article I, which limits the authority of the General Assembly and declares the rights of the people in the following words:
 - ". . . and this convention composed of the immediate representatives of the people chosen by them to assert their rights, and to revise the powers given by them to the government, and from whose will all ruling authority of right flows, doth assert and declare the boundaries of this State to be as follows . . . (giving the boundaries of Georgia.) Including and comprehending all the lands and waters within the said limits, boundaries and jurisdictional rights."

for the reason that:

- (a) Said portion of Section XV is an alienation of the soverignty of the State over said Georgia Railroad Company:
- (b) Said portion of Section XV is an attempt by one legislative body to preempt the right and prerogatives of succeeding legislatures; and
- (c) Said quoted portion of the Constitution reserved to the people of the State the jurisdictional rights, including the right to tax, over the Georgia Railroad Company, and said Section XV was and is in violation of said jurisdictional rights.

This exemption provision, set out in Section XV of the Act of 1833, is especially repugnant to the following portion of said Section XXIII of Article I of the Constitution of 1798:

"And this convention doth further declare and assert, that all the territory without the present temporary line and within the limits aforesaid, is now of [fol. 22] right the property of the free citizens of the

State, and held by them in sovereignty, inalienable but by their consent."

because this alienation of an essential element of sovereignty is in direct conflict with this provision of the Constitution because only the free citizens of Georgia had the power to alienate this portion of the sovereignty of the State, and the legislature had no power to bind the free citizens of Georgia to such a contract of alienation of sovereign powers.

- (5) The granting of this portion of the sovereignty of the State of Georgia by the legislature is further prohibited by said Section XXIII of said Article wherein, after authorizing the legislature to convey to the United States government the western territory of the State, the legislature is authorized as follows:
 - ". . . and may procure an extension of settlement, and an extinguishment of Indian claims in and to the vacant territory of this State, to the east and north of the said river Chattahoochee, to which territory such power of contract or sale by the legislature, shall not extend."

This allied grant of the element of sovereignty to said Georgia Railroad Company was over territory to which the power of the legislature to contract did not extend, and was indeed forbidden.

Twenty-eighth Defense

Defendant says further, that said petition should be dismissed because Section 23 of Article I of the Constitution of 1798 as set forth in the extracts above retained to the people of the State all the powers of sovereignty over its territory, and by reason of said retention, reserved to the people the power to adopt constitutions which would revoke any law that the legislature might pass which would attempt to alienate the State's sovereign power, and in [fol. 23] both the Constitution of 1877 and that of 1945, the people of Georgia as authorized by the 14th Amendment to the Federal Constitution which forbids any State to deny any person the equal protection of the laws, adopted a Constitution which would give all persons the equal pro-

tection of the law relating to ad valorem taxes, and voided any laws which the legislature had heretofore made attempting to alienate the sovereign power of taxation, and the portion of said Section 15 of the Act of 1833 is in conflict with the Constitution of 1877 and or 1945. It is in conflict with Paragraph I, Section I, Article 4 of the Constitution of 1877, which reads as follows:

"Taxation, a sovereign right. The right of taxation, is a sovereign right-inalienable, indestructible-is the life of the State, and rightfully belongs to the people in all Republican governments, and neither the General, nor any, nor all other departments of the Government established by this Constitution, shall ever have the authority to irrevocably give, grant, limit, or restrain this right; and all laws, grants, contracts and all other acts, whatsoever by said government, or any department thereof to effect any of these purposes, shall be and are hereby, declared to be null and void for every purpose whatsoever; and said right of taxation shall always be under the complete control of, and revocable by, the State, notwithstanding any gift, grant, or contract, whatsoever, by the General Assembly.'

It conflicts with Article I Paragraph 3, Section 3 of the Constitution of Georgia of 1945 which reads as follows:

"Revocation of tax exemptions. All exemptions from taxation heretofore granted in corporate charters are declared to be henceforth sull and void."

[fol. 24] Twenty-ninth Defense

The petition should be dismissed for the reason that the relief prayed for is forbidden under the provisions of Title 28, Section 1341 as amended by Congress in 1948, said section as amended reading as follows:

"Section 1341. Taxes by States. The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law, where a plain, speedy and efficient remedy may be had in the courts of such State."

The laws of Georgia provide speedy and efficient remedies to the plaintiff. Code Sections 92-8426.4 and 92-8426.5 pro-

vide that if there is any dispute between the State Revenue Commissioner and the railroad company, there shall be an arbitration as to the valuation. This is appealable to the superior court. When the valuation is fixed it becomes the duty of the State Revenue Commissioner to levy the tax upon the valuation as fixed. This decision of the State Revenue Commissioner may be appealed to the superior court under the foregoing Section 92-8426.4. The plaintiff in this case has three ample, speedy and efficient remedies through which it can litigate with the State as to any rights of tax exemption it might have: First, appeal to the superior court from the levy by the State Revenue Commissioner; Second, pay the taxes levied and sue the State Revenue Commissioner for refund with interest at 6% for any taxes paid the State as provided by Code Section 92-8436, and third, permit execution to be issued and levied and file affidavit of illegality as provided by Code Section 92-8426.4. In the foregoing, the State has provided the remedies for plaintiff, if any it has.

Thirtieth Defense

Defendant is State Revenue Commissioner and is required by the laws of Georgia to assess the value of railroad corporations for the purpose of levying a tax for the State, counties, municipalities and school districts. His acts as such are the acts performed in his official capacity [fol. 25] as such State officer, and hence such acts are the acts of the State of Georgia, and this action to enjoin him from assessing the value and levying the taxes on said valuations is an action against the State of Georgia, to which action the said State has not consented to be sued in this type of action. The State has provided three different methods as set out above, by which plaintiff can litigate and have determined all questions as to its alleged tax exemption.

Thirty-first Defense

Defendant shows that there is a conflict in the judgment sought to be enforced, and that of Georgia Railroad and Banking Company vs. Charles D. Redwine, recently decided in the United States. Supreme Court and pleaded as res judicata in the 5th Defense. In the two cases the pleadings, parties and the prayers were in effect identical. The plain-

tiff waived any rights it might have had to enforce the judgment now sought to be enforced when it went into the State courts on the identical issues and sought a judgment there. The judgment in the State court was diametrically opposed to the judgment now sought to be enforced holding that it was an action against the State of Georgia, and in effect holding that had the same defense been presented by Wright, Comptroller General, in the judgment now sought to be enforced, it also would have been held to have been an action against the State. The latter decision of the Supreme Court of Georgia sustained by the United States Supreme Court, supervenes and takes precedence over the judgment now sought to be enforced. The following quotation from 50 Corpus Juris Secundum, p. 15, Sec. 597, Judgments, expresses the law on this question as follows:

"Section 597. Waiver of, or Estoppel to Assert, Conclusiveness or Bar.

"A party who is entitled to claim the benefit of a former judgment may waive; or be estopped to assert, [fol. 26] the right.

"Although it has been said that, when a cause has been once fairly tried, it ought not to be tried again, even if the parties are willing, it is nevertheless a general rule that a party entitled to claim the benefit of a former judgment may waive or estop himself to assert such right. So, where a party is guilty of laches in setting up the defense of res judicata, or joins issue on the very questions settled by the judgment, or voluntarily opens an investigation of the matters which he might claim to be concluded by it, or makes an admission of record inconsistent with the former judgment, he will be held to have waived the benefit of the estoppel, and the case may be determined as though no such former judgment had been rendered."

Thirty-second Defense

The enforcement of the judgment and decree now sought of this court would be inequitable to the State of Georgia and all its taxpayers for the following reasons, to-wit:

1. The State of Georgia was not heard and its defense was not considered as to whether there was a valid contract of tax exemption.

- 2. The issue as to whether the plaintiff railroad corporation had violated its part of the contract and failed to build the railroads provided by said charter and upon which the tax exemption if any, was a consideration thereof, was not presented to nor considered by the court.
- 3. The enforcement of the judgment would be inequitable because it would deny all the property owners of the State [fol. 27] the equal protection of the laws which require all property owners to bear their share of the burden of government in that all property owners in the counties, school districts and municipalities on all the right of way of said railroad, are forced to bear more than their fair share of the expenses of government, including the cost of protection for the property of plaintiff, expenses of courts in which it litigates, the cost of schools and other improvements, all of which equal protection of the law was attempted to be provided by the vote of the people of Georgia in the Constitution of 1945 in which all tax exemptions were revoked.

Eugene Cook, Attorney General; Claude Shaw, Deputy Assistant Attorney General; Martin Peabody, Assistant Attorney General.

Duly sworn to by Charles D. Redwine. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 28] ORDER ALLOWING AMENDMENT

Within amendment hereby allowed and ordered filed subject to objections.

This 12th day of April, 1949.

Robert L. Russell, United States District Judge.

Filed Apr. 21, 1949.

00

[fol. 29] IN UNITED STATES DISTRICT COURT

Request for Admission Under Rule 36—Filed March 25, 1949

Plaintiff, Georgia Railroad & Banking Company, pursuant to Rule 36 of the Rules of Civil Procedure, requests

defendant, Charles D. Redwine, State Revenue Commissioner, within ten days after the service of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1

That Exhibit A hereto attached is a true copy of the record in the Supreme Court of the United States in the case of William A. Wright, Comptroller General of Georgia, v. Georgia Railroad & Banking Company, 216 U. S. 420, including therein the record in this Honorable Court in the case of Georgia Railroad & Banking Company v. William A. Wright, Comptroller General of Georgia, No. 1192 in Equity in this Honorable Court.

[fol. 30]

2

That Exhibit B attached hereto is a true copy of the record in the Supreme Court of Georgia in the case of State of Georgia v. Georgia Railroad & Banking Company, 54 Ga. 423.

3

That the Georgia Railroad & Banking Company, between 1834 and 1845, both inclusive, constructed a main line from Augusta, Georgia, to Atlanta, Georgia, a distance of approximately 171 miles, and a branch line from Union Point, Georgia, to Athens, Georgia, a distance of approximately 39 miles, and that said construction work was performed either by the Georgia Railroad & Banking Company's own forces or by contractors working under its supervision.

Spalding, Sibley, Troutman & Kelley, Robert B. Troutman, Furman Smith, Attorneys for Plaintiff, 434 Trust Company of Georgia Building, Atlanta, Georgia.

Note: Service omitted.

[fol. 31] EXHIBIT "A" TO REQUEST FOR ADMISSION

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1909

No. 70.

WILLIAM A. WRIGHT, COMPTROLLER GENERAL OF THE STATE OF GEORGIA, the County of Wilkes, and the County of Taliaferro, Appellants,

VS

GEORGIA RAILROAD AND BANKING COMPANY

Appeal from the Circuit Court of the United States for The Northern District of Georgia

Filed February 6, 1908

(21,006)

[fol. 32] Supreme Court of the United States, October Term, 1909

No. 70

WILLIAM A. WRIGHT, COMPTROLLER GENERAL OF THE STATE OF GEORGIA; the County of Wilkes, and the County of Taliaferro, Appellants,

VS.

GEORGIA RAILROAD AND BANKING COMPANY

Appeal from the Circuit Court of the United States for The Northern District of Georgia

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[fol. 34]

No. -

WILLIAM A. WRIGHT, THE COUNTY OF WILKES, AND THE COUNTY OF TALIAFELRO, Appellants,

versus

GEORGIA RAILROAD AND BANKING COMPANY, Appellees

Appeal from the Circuit Court of the United States for the Northern District of Georgia

TRANSCRIPT OF THE RECORD

Solicitors for Appellants: John C. Hart, (Atlanta, Georgia), Attorney General of the State of Georgia. Samuel H. Sibley, (Union Point, Ga.) Hooper Alexander, (Atlanta, Georgia). Ligon Johnson, (Atlanta, Georgia). Solicitors for Appellees: Joseph B. Cumming, (Augusta, Georgia). Alex C. King, (Atlanta, Georgia).

ORIGINAL BILL

United States of America, Northeon District of Georgia:

To the Honorable the Judges of the Circuit Court of the United States for the Northern District of Georgia:

The Georgia Railroad and Banking Company, which avers itself to be a corporation created and existing under the laws of the State of Georgia with its principal office in the City of Augusta in said State, hereinafter styled Orator, brings this its Bill of Complaint against William A. Wright, a citizen of the State of Georgia, resident in the Northern District thereof, in the City of Atlanta, and thereupon Your Orator complains and says

- (1) That the several parties, Plaintiff and Defendant, are citizens and residents as hereinbefore stated.
- (2) That the matter in controversy exceeds, exclusive of interest and cost, the sum or amount of \$2,000, and arises under the Constitution of the United States.
- (3) Your Orator shows that on the 21st day of December, 1831, The Legislature of the State of Georgia passed an Act incorporating Your Orator under the name of "The Georgia Railroad Company." Thereafter, to-wit on the 18th day of December, 1835, said Legislature passed another Act, by the first section of which the name of Your Orator was changed to "The Georgia Railroad and Banking Company."
- [fol. 35] (4) By said first mentioned Act provision was made for the construction of a "Union Railroad" or "Middle Road" and three branch-railroads, from the terminus of the Union Road or Middle Road—one running to Athens, one to Eatonton and one to Madison—all of said named towns being in the State of Georgia.
- (5) It was enacted in the 15th Section of the said first mentioned Act that "the stock of said Company and its Branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads or any one of them; and after that shall be subject to a tax not exceeding one-half per cent. per annum on the net proceeds of their investments."

- (6) Your Orator shows that thereafter, to wit, December 25, 1837, said Legislature passed another Act by which your Orator should have the right to extend its Railroad from the town of Madison "to connect with and join the railroad (then) about to be constructed by the State from Tennessee line, near the Tennessee River to the Southern Bank of the Chattahoochee River." Said Act provided that for that purpose Your Orator should "have all the powers and privileges, rights and immunities in the construction of said Branch from Madison, as aforesaid, to the said State Railroad, as are contained in the several Acts heretofore passed and of force, constituting the charter" of Your Orator.
- (7) Your Orator shows that thereafter, to wit January 21, 1852, said Legislature passed an Act, authorizing and empowering your Orator and the Washington Rail or Plank Road Company to "consolidate their stock, and providing that the two Companies aforesaid, after the consolidation of their stock should be known as one corporate body, under the name and style of The Georgia Railroad and Banking Company and that said corporate body should be authorized to exercise all the powers and privileges conferred by existing laws upon The Georgia Railroad and Banking Company, and be under all the liabilities and restrictions, imposed on the same."
- (8) Your Orator shows that all of the aforesaid Acts of the Legislature are public laws of the State of Georgia.
- (9) Your Orator shows that under said Acts of the Legislature of Georgia, Your Orator constructed and equipped a main railroad from the City of Augusta to the City of Atlanta, a branch railroad from Union Point to the City of Athens and a branch railroad from a station on its main line, known as Barnett, to the town of Washington. All said localities are in the State of Georgia. The length of said Railroads is respectively: Main railroad 171 miles; Athens Branch 40 miles; Washington Branch 18 miles; Total 229 miles.
- 10. Your Orator shows that the stock of the said Company and its branches now consists of and is invested in said railroads set forth in paragraph (9) hereof, with their franchises, and their rolling stock, equipment, depots,

freight-houses, section-houses, tools and other property connected with the said railroads of Orator, except to the amount of \$44000, which is the proceeds of stock issued under an Act of the General Assembly of 1868; and that [fol. 36] the same and every part thereof are their investments, from which the net earnings are to be and are derived, one half of one per centum of which is to measure and fix the amount of taxes to be levied on and collected out of said railroads and other property, with their appurtenant and integral franchises.

Said railroads were constructed and equipped by the outlay of money, subscribed for said enterprises amounting to Four Million One hundred and fifty six thousand (\$4,156,000). Said sum was subscribed and paid by the subscribers to Your Orator and invested by Your Orator under the terms hereinafter set forth of the 15th Section of Your Orator's original Charter in said railroads, their equipment and appurtenances.

- 11. Your Orator shows that by said Fifteenth Section of Orator's Charter and Orator's action thereunder, a contract was created between the State of Georgia and Your Orator, by which the State bound itself never to impose and levy a direct tax upon the property, in which said subscriptions were invested, but to receive in lieu of all taxes and burdens on said property one half of one per cent. of the net earnings of said investments.
- 12. Your Orator shows that for Sixty three of the Seventy years of your Orator's life—Your Orator being absolutely exempt from every kind of tax during the first seven years—the State of Georgia has required of Your Orator, and Your Orator has paid, taxes, upon the theory and practice of such a contract; and said practice of the State as to Your Orator's taxes was never departed from until the passage of an Act by the Legislature, as hereinafter stated.
- 13. Your Orator shows that by the laws of the State of Georgia, Railroad Companies are required to make their annual returns for the purpose of taxation to the Comptroller General of said State, not only for the purposes of State, but also for the purposes of county and municipal taxation. That in accordance with the laws of the State of Georgia requiring from Railroad Companies annual returns to the

Comptroller General of the State of all their taxable prop-. erty as modified by Your Orator's charter, Your Orator has made returns for taxation annually, said returns have been accepted and these taxes assessed thereon paid by Your Orator and accepted by the State. These returns have shown (first) said Railroad as hereinbefore described and its equipment, valued at Four Million two hundred thousand (\$4,200,000) and (second) other property of your Orator. Said returns have claimed—and said claim has been allowed -that the said railroad and its equipment with its integral franchises, were exempt from tax, except to the extent of one-half of one per cent. on the net proceeds derived therefrom, except so far as they were the product of Forty four thousand (\$44,000) Dollars invested under an amendment to Your Orator's Charter passed October 5, 1868—which said amendment did not exempt the investments made thereunder.

- 14. Your Orator shows that such a return as is described in the next preceding paragraph of this Bill of Complaint was made to the Comptroller General for the year 1903 as for former years. A copy of said return is hereunto an-[fol. 37] nexed marked Exhibit A. But your Orator shows that Defendant William A. Wright, who is the Comptroller General of the State, refused to receive said return and demanded of Your Orator a different return, as hereinafter set forth.
- 15. Your Orator shows that on the 17th day of December, 1902, An Act was passed by the General Assembly of Georgia, and approved by the Governor of said State, entitled "An Act to provide for and require the payment of taxes on franchises, and to prescribe the method for the return and payment of said taxes", in and by which it was provided that the term "special franchise" as therein used, should include every right and privilege exercised within said State, granted to any person, partnership or corporation by said State, or its authority, or by any county, or county officer or officers, or any municipal corporation, or any officer thereof, for exercising the power of eminent domain, or for the use of any public highway or street, and every special right granted for the exercise of any public service, such as the construction or operation of railroads, and likewise for the enjoyment of many other like privileges.

Every person, partnership or corporation, holding or owning and exercising any special franchise in the State of Georgia is required to make a special return to the said Comptroller General, stating the value of said franchises as are exercised within said State, and particularly describing the same.

That by said Act, said franchises are classed as and defined to be property and are required to be taxed at the

same rate as other property.

16. Your orator shows that on said demand of the Comptroller General, Your Orator made a second return, a copy of which is hereunto annexed, marked exhibit B. But your Orator protested in making said second return, that no part of said railroad or its equipment—except as to \$44,000 as aforesaid was subject to property taxation.

- 17. Your orator shows that Your Orator has offered, and continues to offer, to pay the amount of taxes assessable against it under its Charter, to wit one half of one per cent. of the net earnings of its investments. But the Comptroller General refuses to accept said payment as a compliance by Your Orator with its legal obligation to pay taxes; but, on the contrary claims: First that Your Orator should pay a direct tax on the value of its aforesaid railroad and equipment in excess of Four Million One hundred and fifty-six thousand dollars; and Second that your Orator should pay a tax on Your Orotor's franchises. Said second claim is made under said Act of the Legislature of Georgia approved December 17, 1902, entitled "An Act To Provide for and require the payment of taxes on franchises, and to prescribe the method for the return and payment of said taxes."
- (18) But your Orator avers that it is not liable to said franchise tax or to any tax as to its said railroad and equipment, except a property tax on \$44,000 and an income tax of one half of one per cent, on its net earnings.
- (19) Your Orator shows that its railroad property, the representative of the investment of its stock, has, as an [fol. 38] inseparable and essential element constituting its chief value as the investment of its stock, the very franchise attempted to be thus separately taxed. That but for such franchises said property would be of little if any value, and of no value whatever as a railroad. That but for the element

of value derived from the franchise, the capital stock could not have been raised, it would not have been invested in the railroad property above mentioned, and no income nor proceeds, net or gross; of any kind could be derived therefrom.

Your Orator shows that an amount equal to one-half of one per centum upon the net proceeds of the said railroads and their franchises, is, by its contract with the states under which said railroads and franchises, with their equipments were invested in by the said Company, fixed as the property tax to be levied on said railroads, franchises and equipments, and that any pretended act of the legislature of Georgia assuming to levy any other sum upon any part or against any part of said property, including said franchises, impairs the obligation of the contract made by the State of Georgia with Your Orator by said Section 15 of said Act of 1833, and is contrary to the Constitution of the United States.

- (20) But your Orator shows that nevertheless the said William A. Wright, who is Comptroller General of the State of Ceorgia, acting as such Comptroller General, insists that Your Orator shall pay to the State of Georgia, to fifteen counties of said State and numerous municipalities through which Your Orator's said Railroad passes, a property tax on (\$1,990,756) Dollars, said sum representing the alleged excess in value of Your Orator's investments in its said railroad over and above the par of Your Orator's capital stock the tax thus demanded being for the year. 1903 \$20000 or other large snm
- (21) Your orator shows that said William A. Wright acting as Comptroller General as aforesaid, claims that the franchises of Your Orator should be valued outside of, and in addition to, its property at a large but as yet indefinite sum, and that Your Orator shall pay taxes on said sum, when determined, to the State of Georgia, to fifteen counties of said State and to numerous municipalities through which Your Orator's said Railroad passes.
- (22) Your Orator shows that said Comptroller General is threatening and is about to proceed, to collect said illegal taxes by levy and sale of Your Orator's property.
- (23) Your Orator shows that said purpose and attempt to/collect said taxes are illegal and void: Because the Charter

(I)

of Your Orator is a contract between Your Orator and the State of Georgia, and by said contract said State bound itself to exact no taxes from Your Orator on account of its investments in the railroad aforesaid, exceeding one half of one per cent. of the net earnings of said investments, and said taxes would be greatly in excess of one half of one per cent. of said earnings; and said threatened action of said Comptroller General and said Act of the Legislature of Georgia of December 17, 1902 would impair the obligation of said contract, and are unconstitutional, null and void under Paragraph 1 of Article 10 of the Amendments to the Constitution of the United States.

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Ifol. 39] (24) That the railroads of the state so valued are returned and their valuations are demanded by the Comptroller General at a higher value, proportioned to their market value, than is any other species of property in the State; that the taxing officers of said state require returns of all other property to be made, and accept same at a percentage of real value far below the percentages required of Your Orator and other owners of railroads in said state of Georgia, and deny to Your Orator and other owners of crailroads in this State, the equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States.

25. Your Orator shows that the laws of the State of Georgia, governing the returns of property for taxation, require such returns to be made at the fair market value of said property. That such valuation of railroads in their return is required of railroad companies in making such returns, and such returns thus made do, and of necessity must, include as one element of value, the value as property and as a part of the railroad as a property, the "special franchises" as defined in said Act of 1902 above named, possessed, used or exercised in building owning or operating a railroad.

26. That the demand of said Comptroller General that Your Orator should pay taxes upon its railroad and property, to wit on the amount of four million, one hundred fifty six thousand dollars thereof, as equal to one half of one per cent. of the net proceeds of the earnings of said railroad and properties and upon the surplus of valuation of said railroad and other properties at the rate of tax levied

by the state, and also should pay a tax upon the alleged valuation fixed upon its alleged franchises as a part of its property, is, if enforced the taxation by the said state of the property of your Orator and of the same propert, twice; in this that the value of said railroads and other property upon which said taxes first herein mentioned are levied includes as a part and integral element of said railroads and other property the franchises to own, operate, use and construct the same, including the franchise of eminent domain; that without the same, the said property would be of value only as so much material, and would not be of the value mentioned in said return Exhibit B and that said valuation is not fixed upon the basis of said railroad as so much material. but is fixed upon the same as an operating, going railroad, and includes therein, as an element and part of said property, the said franchises so attempted to be separately taxed; that the laws of said state require the return of railroads for taxation, not as so much material, but as going concerns, and includes in such valuations each and every one of the franchises so required to be specially returned by the afoeesaid Act, approved December 17, 1902; that if the said Comptroller General is allowed to collect taxes on the said railroads and other property of Your Orator as specified in said return Exhibit B in accordance with the valuation therein fixed, and also to collect additional taxes upon the so-called special franchise of Your Orator, as described in said Act of the General Assembly approved December 17, 1902, Your Orator will be paying taxes twice upon the same property, to wit upon said franchises and their value; that such payment and demand will not only be contrary [fol, 40] to the Constitution of the State of Georgia, which provides that all taxation of property shall be ad valorem and uniform, but will also be in violation of the Fourteenth Amendment to the Constitution of the United States, in that it will deny Your Orator the equal protection of the laws and compel it to pay taxes twice upon the same property, whereas the other tax payers of said State are only required to pay taxes upon the same property once; that under the Constitution of the State of Georgia, no classification of property for the purpose of taxation is permitted, but all property is divided into two classesthat which is exempt from taxation, said exempted property being specified in the Constitution of said State, and

property which is not exempt; and that the property of railroads, including their franchises, together with all other property not exempt, stands in one class, and unless taxed in the same manner and to the same extent only, the owners of said railroad property and franchises are denied the equal protection of the laws.

(27) Your Orator being remediless under the rules of the Common Law and unable to obtain any relief except in a Court of Equity, to the end that the Defendant William A. Wright may, if he can, answer the several charges hereinbefore made against him, but not under oath, waives discovery from said Defendant and prays:

First. That it be adjudged that Your Orator is not liable for a property tax on its Railroad aforesaid, or any tax on its franchises; and that the only tax for which Your Orator is liable is a tax to the State only, not to exceed one half of one per cent. of the net earnings of Your Orator's investments in its railroad.

Second. That the said William A. Wright, Comptroller General, be enjoined from issuing any execution or taking any step to collect any tax from Your Orator, other than one half of one per cent of the net earnings of its investments, or any tax on Your Orator's franchises.

Third. That Your Orator may have all other and further relief that its case may require and equity can afford.

And your orator will ever pray, etc.

Jos. B. & Bryan Cumming, Complainant's Solicitors.

King, Spalding & Little, of Counsel.

(Here follow Exhibit A and Exhibit B, tax returns, marked pp. 10, and 11)

ANNUAL RETURN FOR TAXATION

x Secret Company of all property casted by said Company on the Mar. 15

pursuance of Law, without declaring the indebtedness of said Company.

Of the Georgia Railroad

1903 , made to the Comptroller-General by the President, in

\$ 34730,00 \$ 34730,00 \$ 143730,00 \$			OF FRANCHISES	VALUE OF REAL ESTATE AND ROAD BED IN THIS STATE	AGGREGATE VALUE OF WHOLE PROPERTY IN THIS STATE.	Rate in Amount State Tax,	Return of Property for	and the second of the second
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			\$54750.00	\$56000.	00	110750.001	Business Tolling and an artist and the second of the secon	
STATE OF Georgia County of Richmond Before me personally appeared. Thus. E. Scott General Manager Roughout o said Company, who, being duly sworn, deposeth and saith that the foregoing statement contains, by items, a true and				9		1,10750.001		

stated is its full market value. Sworn to and subscribed before me, this

· Before me personally appeared. Thos. K. Scott

Georgia Railroad,

1900 3, and that the value thereof as

correct return of all the property owned, controlled or held by or on behalf of said Company therein named, without deducting indebtedness of same, on the Ries: 15th March 4

Of the

Railroad Company of all property owned by said Company on the Mar 15 19 pursuance of Law, without deducting the indebtedness of said Company.

must be made on or before the first day of Mare and the Taxes thereon paid by the 20th day of becomber.

190 3 made to the Comptroller-General by the President, in

0	VALUE OF ROLLING STOCK				VALUE OF REAL ESTATE AGGREGATE VALUE OF State Tax						Return of Property for State Taxation.						
	AND ALL OTHER PERSONAL	VAI	LUE OF FR	ANCHISES	4.	ROAD BE			E PROPERTY	Rate in Mills.		State Tax,	KISD OF PROPERTY	No. of Cars. &c.	Value of Each	Total Vame	Remarks
	PROPERTY IN THIS STATE					THIS STATE	E	IN T	HIS STATE	, Milla,		54 HA 1957		1315, 47			
				(4)	\$			S .	W.				City or Town Property, lots,				
			-114	Value in t	he Sever	al Condti	14 5		*	1			Lands, Acres,			192098 4	
>			gen and		ne Sever					1			No. Miles Main Track,	227		2270000 0	4
	CAUCHTIES	Main Track Miles	VALUE	Value of Real Estate, includ- ing Depots, &c.	Vulue of Bridges	Total Value of Track and Real Estate	Property located in countr	Provata Velu- Personal Prop- erty in county	Value Bra Estate unt used for R. R. Purposes	Aige m. A.	in County	numly County Rates Tax	Su. Miles Side Track,	62	-	486000 0	
		4	•	1		•	•	•				1 1	No. Bridges.	19	- 5.7	75/200 0	
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and the second	Columbus McTuffie	16.7				B.			none	11/			No. Depois and other Buildings,	242		141650 0	9
		16.					1600		300.00				Water Tanks, Pumps, Stationary Engines, World-Sheds, Saws Coal Structures, within this State.	25		10000 0	1
	do	8:7	•				7						Value of Wharfs Docks, Warehouses, etc.,				
	Taliaferro Main line	12.7				A.74			150.od		1111		Locomotives for Passenger Service.				1
	Greene Athens Br.	6.9						-	950.00				Locomotives for Switching Service,	49	5000 00	21:5000 0	
		25.2							700.00		· c		Locomother for Construction Service,	.6	3000		ineres of
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		1 4											Sleeping Care, Condemned	5	800 00	4000 00	34
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		25.1				*			none				· Haggage, Mail and Express Cars (combined),	10	F.	120	<u> </u>
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8				•	•	5	• ,	•			344		Coal, Stone or Ore Cars (8 wheels),	50	600 od	30000 0	S
	Augusta	1.868									1.		Coal, Stope or Ore Care (4 wheels),	217	25000	54250 0).
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	wasning ton	1.326		9-			9			25.00			Repair Care (push). 🐇	0			
	Crawfordville Union Point	1.			A. A.	0			950.00	0			Repair Cars (lever and crank),	0			
	Crawford	.681				1				Y			Malo Seas Care, Shanty	23	100 00	230000	
	Athens Greensboro	1.64 .458					- 0 ta.,		4900.00				Kananaka Cara furnigure	0	400 00	- 2000	
	Buckhead Madison	1.05							500 0		7 - 3-1-10		Stram Shovel Cara,	3	100 00	300 0	
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	Rutledge Social Circle	1.98											Gravel or Dunip Cars.	0	0		
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-	Stone Wountain	1.216		A			/						Number Stocks and Souds of corporations of this and other State- oward by the Company, whether in c out of the State of the			1716040 0	
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	Atlanta	. 95		1		1/	14.	•	44500.00	1	4		Cash on hand and Amounts due from other Hoads,			325642 3	
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	TUTALS.		manage of the same	100		7		A Second	\$54750.do	, to						The sale of the sa	

STATE OF

County of

Before me personally appeared President of said Company, who, being duly sworn, deposeth and saith that the foregoing statement contains, by items, a true and correct return of all the property owned, controlled or held by or on behalf of said Company therein named without deducting indebtedness of same, on the First 190 , and that the value thereof as stated is its full market value.

Sworn to and subscribed before me, this

President of

The Georgia Railroad & Banking Company in making the within Return protests:

- (1) That all its investments in railroad property on its
 Railroad from Augusta to Atlanta and at those places, and on its branch
 line from Barnett to Washington, and on its branch line from Union Point
 to Athens; and in property used in the operation of said railroad and
 said branch lines are covered by its original charter, granted December
 23, 1833, and amendments thereof, made prior to January 1, 1863, without
 reference to the value of said investments; that said investments are
 not liable for a property tax; and that as to them said corporation is
 liable only for a taxof one half of one per cent on their net earnings.
- (2) That it is not liable to pay a tax on \$15,542.88 of "Dividends not paid out" or any part thereof, for the reason that said amount and every part thereof is an indectness of the corporation to its stockholders, and no part thereof is taxable assets of the corporation.
- "Stocks and Ronas owned by the Company" or any part thereof except
 "\$31,000 Walton Railroad Company's bonds and \$25,000 Bills receivable—
 the balance \$1,660.040 consisting of shares of the stock of the following comprises to wit; Georgia Railroad Bank, The Atlanta and West Point
 Railroad Company and The Western Railway of Alabama- none of said shares being taxable under the laws of this State.
- (4) That the sum \$325.642.31 or any part thereof is not subject to tax- all of said sum being net earnings, on which a tax of one half of one per cent is paid in accordance with this protestant's charter.

And The Georgia Railroad and Banking Company soleminly protests that all the within Return and every part thereof is made for the
purpose of furnishing the office of the Controller General with information, sought by said office, and not for the purpose of making
a "return of Property for State Taxation."

The Georgia Railroad and Banking Company.

by Jacob Phinizy, President.

TAX RETURN

RAILROAD COMPANY,

Tax must be paid Treasurer of the State on or before December 20th, 190____

FILED IN OFFICE

this _____ day of _____ 190_

WM. A. WRIGHT, Comptroller-General.

Recorded Folio

Records of 190

Value of Property, \$_____

Tax,

[fol. 44] STATE OF GEORGIA, RICHMOND COUNTY:

You Jacob Phinizy do swear that you are the President of The Georgia Railroad and Banking Company; and that the matters and things in the foregoing Bill stated are true of your own knowledge, except where stated upon information and belief, and that these you verily believe to be true.

Jacob Phinizy.

Sworn to and subscribed before me this 6th day of January 1904. Geo. K. Calvin, U. S. Commissioner for Southern District of Georgia.

FILING

Original Bill Filed in Clerk's Office January 7th, 1904 O. C. Fuller, Clerk.

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

In Equity. #1192

THE GEORGIA RAILROAD AND BANKING COMPANY

WM. A. WRIGHT

Upon considering the bill of complaint in the above stated case, it is ordered that the defendant therein named, Wm. A. Wright, do show cause before me on Saturday the 30th day of January, 1904, at ten o'clock a.m. or so soon thereafter as counsel can be heard, at the United States Court House in the City of Atlanta, Georgia, why the injunction prayed for therein should not be granted; and in the meantime, until the further order of the Court, the said defendant, Wm. A. Wright, is restrained as prayed for in said bill.

Let the said defendant be served with subpoena and a copy of this order at least 15 days before the hearing.

This 7th day of January, 1904.

Wm. T. Newman, U. S. Judge.

Filed in Clerk's Office 7 day of Jan'y 1904.

O. C. Fuller, Clerk, By J. D. Steward, Deputy.

[fol. 45] UNITED STATES OF AMERICA,
Northern District of Georgia:

In Equity

THE GEORGIA RAILWAY & BANKING COMPANY, Complainant,

and

WILLIAM A. WRIGHT, Defendant

The Rresident of the United States to William A. Wright:

For certain causes offered before the Judges of the Circuit Court of the United States for the Northern District of Georgia, in Equity, you are hereby commanded and strictly enjoined, that, laying all other matters aside, and notwithstanding any other excuse, you personally be and appear at the Clerk's office of the said Court, in the City of Atlanta, at Rules to be had on the first Monday in February 1904 next, to answer to those things which shall then and there be objected to you by the Bill of Complaint of the Georgia Railway and Banking Company and to do further, and receive what the said Court shall have considered in this behalf, and this you may in no wise omit, under penalty of Five Hundred Dollars; and have here this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 9th day of January in the year of our Lord, One Thousand Nine Hundred and four.

[Seal U. S. Circuit Court, Northern District of Georgia]
O. C. Fuller, Clerk.

Memorandum.—The Defendant is required to enter his appearance in the suit above stated, in the Clerk's Office, on or before the day at which this Writ of Subpæna is returnable, otherwise the Bill may be taken pro confesso.

O. C. Fuller, Clerk.

[Endorsed:] No. 1192. In Equity. In the Circuit Court of the United States for the Northern District of Georgia. February Rules, 1904. In Equity. The Georgia Railroad and Banking Co., Complainant, and William A. Wright, Defendant. Subpæna. Returned into Clerk's Office, and filed January 9th, 1904. O. C. Fuller, Clerk. Jos. B. & Pryan Cumming, King, Spaking & Little, Complainant's Solicitor.

I Certify that I served the within Writ of Subposes on the parties at the places, time, and in manner stated.

Name of person served. How served. When served. Where served.

Service of Subpæna and all further service waived, copy subpæna and order received.

This January 9th, 1904.

William A. Wright, By Jno. C. Hart, Att'y at Law & Attorney, General for Georgia.

The return of — — Marshal, this — day of ——

By --- , Deputy.

Marshal's Costs, \$-

[fol. 46] Exceptions of Wm. A. Wright

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

No. -. In Equity

GEORGIA RAILROAD & BANKING COMPANY

VS.

WM. A. WRIGHT

Exceptions Filed by the Defendant to the Original Bill .
Filed in this Cause by Plaintiff for Irrelevancy

Now comes Wm. A. Wright, the defendant in the above stated cause and excepts to all of paragraph 24 of complainant's bill and for cause of exception says,

- 1. The Constitution and laws of the State require that all property shall be taxed ad valorem and uniform. The laws of the State treat alike, for the purpose of taxation, railroad property and all other species of property. The mal-administration of a valid State law makes no Federal question. No law can be held un-constitutional unless it conflicts with the constitution.
- 2. In this case the taxes sought to be collected are upon the return made by the complainant itself, and while it

protests against its liability to taxation, by reason of the provision in its charter, no question is raised that the values placed upon the property sought to be taxed are beyond their true market value.

- 3. Complainant will not be heard to set up in a court of equity that other species of property has been returned, or accepted, for taxation, at a percentage of value lower than it offers to return its property for taxation, without first having tendered at least the taxes due by it at the valuation fixed upon other species of property.
- 4. Return of property in this State is made primarily by the property owner, or in case of corporations, by the representative of such corporation. In case of railroads the property is returned to the Comptroller General. In case of other species of property, to the tax receivers of the State. In case of disagreement between the owners or representative of the property to be taxed and the taxing officer, it is provided that the ultimate fixing of value is by arbitration and by arbitrators selected by the parties at interest. It will be noted therefore that the allegations in paragraph 24 are misleading and are not founded upon either law or fact, and are not pertinent or relevant to the issue, and present no Federal question.

Therefore this exceptant excepts to that portion of the bill as impertinent and humbly insists that that portion ought to be expunged therefrom

Jno. C. Hart, Counsel for Defendant.

[fol. 47] UNITED STATES OF AMERICA, Northern District of Georgia, County of Fulton:

Wm. A. Wright makes solemn oath and says that he is the above named defendant and that the foregoing exception is not interposed for delay and that the same is true in point of fact.

Wm. A. Wright, Defendant.

Subcribed and sworn to before me this 3 day of March, 1904; W. H. Harrison, N. P., Fulton Co., Ga.

I hereby certify that in my opinion the foregoing exception is well founded in point of law.

Jno. C. Hart, Counsel for Defendant.

Filed in Clerk's Office 12 day of May, 1904. O. C. Fuller, Clerk, By J. D. Steward, Deputy.

PLEA OF WM. A. WRIGHT

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

No. -. In Equity

GEORGIA RAILEOAD & BANKING COMPANY

VS.

WM. A. WRIGHT

Plea of Wm. A. Wright, the Above Named Defendant

This defendant by protestation, not confessing or acknowledging all or any of the matters and things in said bill to be true in such manner and form as same are therein set forth and alleged, pleads to said bill as follows; to wit.

- 1. That the charter by said bill specified and as in said bill shown, is a charter granted by the Legislature of the State of Georgia by an Act of December 31st, 1833, and is a statute and part of the general law of the State of Georgia.
- 2. At the February Term, 1879, of the Supreme Court of Georgia in the case of Goldsmith, Comptroller General vs. Georgia Railroad Company, and the Georgia Railroad Company vs. Goldsmith, Comptroller General, reported in the 62 Ga. p. 485 et seq. the Supreme Court construed said charter and statute of the State of Georgia, particularly the section by complainant in this bill sought to be plead as an exemption to the tax levy complained of:
 - 3. That by said decision the Court declared the true construction of said charter and statute, and the proper mode of taxation thereunder, to be as follows; [fol. 48] "2. The limit on the taxing power extends to all the capital of said company, except so much thereof as was issued under the amendment of 1868 authorizing the Clayton branch. 54 Ga., 423. The correct mode of taxing the company's property under existing laws is to estimate all its property at its true value, just as if it belonged to a natural person, and upon so much of this value as equals the amount of the whole capital stock other than that issued for the Clayton branch, assess at the charter rate, (that is at such per centage as will yield a revenue to the State equal to

one-half of one per cent on the net annual proceeds of all the company's investments); and upon the balance of such value, if any, assess at the general rate. If, however, the charter rate thus arrived at should exceed the general rate, then assess at the latter con the whole value, as in no case is the general rate, this is, the rate ad valorem imposed upon property generally, to be exceeded."

4. That said decision is the true, proper, legal construction of the said charter, is between the same parties and involves the question now raised by complainant, and said judgment will be observed by, and is binding upon, this Honorable Court.

5. That said levy sought to be enjoined is in strict accord with the construction of said charter, the tax exemptions thereunder and the findings, terms and conditions of said decision and the laws of the State of Georgia, and in there-

fore a legal and proper levy.

All of which matters to and things this defendant avers to be true and pleads res judicata to said bill and prays judgment of this Honorable Court whether he should be compelled to make any other or further answer to said bill, and prays to be hence dismissed with its costs and charges in this behalf wrongfully sustained.

Jno. C. Hart, Counsel for Defendant.

UNITED STATES OF AMERICA, Northern District of Georgia, County of Fulton:

And Wm. A. Wright makes solemn oath and says that he is the above named defendant and that the foregoing plea is not interposed for delay and that the same is true in point of fact.

Wm. A. Wright, Defendant.

Subscribed and sworn to before me this 3 day of February, 1994. W. H. Harrison, N. P., Fulton Co., Ga.

I certify that in my opinion the foregoing plea is well founded in point of law.

Jno. C. Hart, Counsel for Defendant.

Filed in Clerk's Office 12 day of May, 1904.
O. C. Fuller, Clerk, by J. D. Steward, Deputy.

[fol. 49], Demurrer of Wm. A. Wright

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

No. -. In Equity

GEORGIA RAILROAD & BANKING COMPANY

VS.

WM A. WRIGHT

Demurrer of Wm. A. Wright, Defendant Above Named

This defendant by protestation, not confessing or acknowledging all or any of the matters or things in said bill to be true in such manner and form as same are therein set forth and alleged, demurs to said bill as follows; to-wit:

- 1. Said bill upon its face shows the same to be a suit between a citizen of the State of Georgia and said State or a citizen thereof and no federal question is presented by said bill.
- 2. It appears from plaintiff's own showing by said bill that it is not entitled to the relief prayed against defendant.
- 3. Defendant specially demurs to paragraph 23 in the original bill of complaint in which paragraph it is alleged the charter of complainant is a contract between it and the State in which the State bound itself to exact no taxes from complainant in excess of one-half of one per cent of the net earnings of complainant, and for cause of demurrer says,

The Act of December 17th, 1902, passed by the General Assembly of the State of Georgia and entitled "An Act to provide for and require the payment of taxes on franchises and the prescribe the method for the return and payment of said taxes" does not, as claimed by complainant impair the obligation of the contract set forth in complainant's charter in violation of Article 1, Section 10, paragraph 1 of the Constitution of the United States, for by the charter of complainant the limitation of the tax rate applied to the original investment represented by stock in said company and that the franchise of said company is not within the property protected.

4. Defendant demurs to paragraph 11 of complainant's bill in which paragraph complainant avers that a contract

was created between the State of Georgia and complainant by the 15th Section of complainant's charter by which contract the State bound itself never to impose and levy a direct tax upon the property in which said subscriptions were invested but to receive in lieu of all taxes and burdens on said property one-half of one per cent of the net earnings of said

investment and for cause of demurrer says,

That the provision aforesaid is a covenant between the State and the stockholder that it would never levy a tax on the original investment in said railroad company in excess [fol. 50] of one-half of one per cent of the net investments thereof, but that the State did not contract to commute the tax rate upon the property of complainant in excess of the original investment and that the surplus which it was seeking to tax at the general rate is not protected under the contract as claimed by complainant and that said excess of property which represents accumulated profits, surplus and subsequent investments is not protected by said contract.

Wherefore and for divers other good causes of demurrer appearing in said bill this defendant demurs thereto and humbly demands judgment of this Court whether he should be compelled to make further answer to said bill or to the parts of said bill demurred to as aforesaid, and prays to be hence dismissed with its costs and charges in this behalf

wrongfully sustained.

Jno. C. Hart, Counsel for Defendant.

United States of America, Northern District of Georgia, County of Fulton:

Wm. A. Wright makes solemn oath and says that he is the above named defendant and that the foregoing demurrer is not interposed for delay and that the same is true in point of fact.

Wm. A. Wright, Defendant.

Subscribed and sworn to before me this 3 day of February, 1904.

W. H. Harrison, N. P. Fulton Co., Ga. that in my opinion the foregoing de-

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

Jno. C. Hart, Counsel for Defendant.

Filed in Clerk's Office 12 day of May, 1904.
O. C. Fuller, Clerk, by J. D. Steward, Deputy.

Amendment to Bill

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

In Equity

THE GEORGIA RAILROAD AND BANKING COMPANY

VR.

WILLIAM A: WRIGHT, Comptroller General

Complainant by leave of the Court amends its bill of complaint in this case, by adding thereto a new paragraph to be known as Paragraph 12½ and to come just after paragraph

12, and before paragraph 13 thereof.

This complainant avers that it is res judicata between your Orator and said State of Georgia, that said Section 15 [fol. 51] of the charter aforesaid constituted a contract exempting from taxation its railroad, equipment, franchises and appurtenances as the investment of its stock, except to the extent of said one-half of one per centum per annum on said net income.

Said State of Georgia in the year 1875 undertook to collect taxes upon the said railroad equipment, franchises and appurtenances, by levying thereon and collecting therefrom taxes as against other railroad companies having no charter provisions, governing taxation, under the Act of 1874 for the taxation of Railroads. Said State through its Compa troller General issued an execution for the collection of such taxes so claimed. Said execution was arrested by the making of an affidavit of illegality as prescribed by law for trying the issue of said legality of said tax, the same being brought to, and returnable to the Superior Court of Fulton County, Georgia. Said case was duly tried in said Court, the issue being that by reason of said Section 15 of Orator's charter this complainant was not subject to be so taxed. Said Court adjudged that said Section of said charter relieved said complainant from liability to said tax, and that under said section it could not be taxed except as to the investment of its stock subscribed under an amendment to its charter passed by the General Assembly of Georgia in the year 1868 for building what was called the Clayton-Branch, and final judgment was entered accordingly. Said

case was appealed by said State to the Supreme Court of Georgia, where said judgment was in all things affirmed.

No other final judgment has ever been had construing your Orator's exemption from, or contract governing, taxation. Said judgment adjudges that said contract is one regulating the liability of the corporation, your Orator, to taxation upon its property, and not the liability to taxation of its shareholders, and also that the same exempts its railroads, franchises, equipment and appurtenances, except the investment made under said Act of 1868.

Complainant offers to produce the record of said cause and judgment, and says that the same is res judicata as

Jos. B. Cumming, Bryan Cumming, Complainant's Solicitors.

King, Spalding & Little, of Counsel.

Order Allowing Amendment

This amendment is allowed and ordered filed. This May 13th, 1904.

Wm. T. Newman, U. S. Judge.

Filed in Clerk's Office May 13th, 1904.
O. C. Fuller, Clerk, by J. C. Moore, Deputy.

[fol. 52]

Opinion of the Court

IN THE CIRCUIT COURT OF THE UNFIED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

GEORGIA RAILBOAD & BANKING COMPANY .

VS.

WILLIAM A. WRIGHT, Comptroller General .

OPINION

This is a bill brought by the complainant corporation against the defendant Wm. A. Wright, Comptroller General of the State of Georgia, seeking an injunction against what the company claims is an illegal effort to tax it, and to have a decree adjudging that it is not liable for a property

tax on its railroad, or any tax on its franchise, and that the only tax for which it is liable is a tax to the State of one-half of one percent on the net earnings of its investments.

The defendant has interposed demurrers and pleas, and the complainant, by an amendment, the plea of res judicata, all of which, however, put in issue and bring before the court clearly, certain specific questions as to the liability of the complainant company for taxation by the state of Georgia, which will be hereafter referred to.

The Georgia Railroad & Banking Company was incorporated originally under the name of the Georgia Railroad Company, by an act passed by the legislature of Georgia approved December 21st, 1838. The provision of the act material here, and which is for construction, is a part of the fifteenth section, as follows: 'The stock of said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads or any one of them: and after that, shall be subject to a tax not exceeding one-half per cent per annum on the net proceeds of their investments.'

The State has for sixty years or more allowed the company to return its net earnings and pay a tax thereon of one-half of one per cent, without objection, so far as shown here, except (as will be hereafter referred to) the effort to impose a property tax under the act of 1874.

The issues presented are: (1). Does the word "stock" as used in this taxing clause in the company's charter refer to stock in the aggregate in the hands of the company, (its capital stock) or does it refer to stock in the hands of the shareholders? (2) Is the decision of the supreme court of Georgia rendered in 1874 on the right to tax this corporation, res judicata in this case! and (3) Is this company subject to a tax cn its franchise under the Franchise Tax Act of the legislature of Georgia of 1902 in view of the taxing clause in its charter! Other minor questions are raised, but the foregoing are the main and important ones.

[fol.53] The distinguished Attorney General, representing the Comptroller General, contends that the word "stock" in the clause under consideration refers to stock in the hands of the shareholders, as distinguished from the entire capital stock of the company; and he concedes that the case very largely depends upon the soundness of his contention in this respect. He has urged with much force both

in the oral argument and in the brief he has handed in, this view of the proper meaning of the taxing clause of the charter of the complainant company, which has been quoted above.

It may be remarked in the first place, that so far as this record shows, or so far as the reported cases show, no effort has ever been made on the part of the State or its officers to treat the scheme of taxation provided for in this clause of the Georgia Railroad Company's charter, as referring to shareholders. The tax has always been imposed upon the net earnings of the company, the State treating the word "stock" therefore, necessarily as meaning the capital stock in the hands of the company, and not the separate shares of stock in the hands of the shareholders. This course of procedure by the officials of the State has been justified by the decisions of the supreme court of the State.

In the case of City Council of Augusta v. Georgia Railroad & Banking Company, 26 Ga., 651, the language used by the court in the opinion, clearly indicates that such is its view of the meaning of the word "stock." This is from the opinion:

"We think, that this part of the charter means, secondly, that the stock of the company, as stock; as a unit; is alone what is to be subject to the tax;" etc. And this further expression: "We think, then, that the stock employed in banking, is to be considered as included in the expression, the stock of the company: and therefore, that it, also is entitled to the exemption."

In the opinion of the court in State of Georgia v. Georgia Railroad & Banking Company, 54 Ga., 423, the language "that its tax shall not exceed one-half per cent. on its earnings" is manifestly to the same effect.

These expressions used by the Supreme Court in the decisions named, show beyond question that the court considered the term "stock" as referring to stock in the aggregate in the hands of the company.

In Ordinary of Bibb County v. Central Railroad & Banking Co., 40 Ga., 646, 650, Judge Warner speaks of stock of a corporation in this way. "What is the 'stock' of said railroad companies? Bouvier defines stock to be, 'the capital of corporations; this is usually divided into shares of a definite value, as one hundred dollars, fifty dollars per share."

2d Bouvier's Law Dictionary, 531. The stock of these companies then consists of their capital invested in such property as may be necessary and proper for conducting the business for which they were chartered. All the property of these companies that is necessary and proper, for the purpose of laying, building and sustaining their respective railroads, constitutes a part of the capital stock of said companies, and is not liable to be taxed in any other manner than is specified in their respective charters.

[fol. 54] It is further urged that the use of the pronoun "their" preceding the word "investments" indicates that the reference in the clause is to shareholders who should become interested in this enterprise, and not to the corporation. The opposing contention is that it is used in the same sense as if the pronoun "its" had been used instead of "their".

An examination of this act shows the latter contention to be true, beyond question. The first section of the act has this language; "The company provided for in this Act and herein more especially incorporated and authorized shall and may direct and confine their first efforts" etc. In the third section, these two expressions are used: "The said company shall be at liberty to enlarge their capital", and "books for enlarging their capital" etc. And also in the same section: "so as to make their capital adequate" etc. And also this: "It shall be lawful for the company from time to time to invest so much of said parts of their capital or of their profits" etc. In section 9 this occurs: "The aforesaid company", by their corporate name aforesaid may sue" etc.

And in section 10: "The said Georgia Railroad Company shall have power and capacity to purchase and have and hold in fee simple or for years to them and their successors" etc.

In other instances the pronouns "their," "they" and "them" are used in referring to the company.

The language of the clause itself indicates that the word "their" relates to the company, and not to the stockholders separately. Reference would hardly be made to what the stockholder gets by way of a dividend, as the "net" proceeds of his investment. The use of the word "net" indicates that something is being deducted. It could only refer to the company, which deducts its expenses, and has clear,

over and above all outlay, a certain amount, which is the net proceeds in its hands on the investment.

In addition to this, the supreme court of the State in State of Georgia v. Georgia Railroad & Banking Company, supra. clearly treats the word "their" as having this meaning, when the tax provided for in this clause is spoken of as a tax,

"on its earnings," etc.

There can be no reasonable doubt, therefore, considering this entire clause, that it refers to the capital stock of the company, and that it was the intention of these early lawmakers that the company should pay the State, after seven years from the completion of the road, one-half of one per cent, on its net earnings. There was nothing remarkable about this provision, when we considered the time and conditions. In 1833 railroad building was in its infancy. No one could tell whether this project would be successful, or not. It was experimental. Those who put in their capital might, (so far as could then be seen) suffer complete loss. What was more natural than that the legislature should allow a very moderate scheme of taxation for such an enterprise?

In 1874 an act was passed by the legislature of Georgia, entitled "An Act to amend the tax laws of this State, so far as the same relate to railroad companies and to define the liability of such companies to taxation, and to repeal so [fol. 55] much of the charters of such companies, respectively, as may conflict with the provisions of this Act." In the body of the act was provided that "the presidents of all the railroad companies in this State-shall be required to return, on oath, annually to the Comptroller General, the value of the property of their respective companies without deducting their indebtedness; each class or species of property to be separately named and valued, so far as the same may be practicable, to be taxed as other property of

the people of the State."

Under this act an effort was made to tax the Georgia Railroad & Banking Company; the matter was carried into the courts, and determined in favor of the railroad company by the Superior Court of Fulton County. The case was taken by the State to the Supreme Court and by that court the judgment of the court below was affirmed. State of Georgia v. Georgia Railroad & Banking Co., supra.

The decision in that case is a comprehensive one. So much of the opinion by Judge McCay as is material here is as follows:

"As the Supreme Court of the United States is a court of appeals from this court, on a question of this character, I feel bound to conform myself to its decision, although, I feel it to be my duty to what I deem the truth, to express my dissent from the conclusions at which it has arrived. On the authority of these decisions, we therefore decide that it is competent for the general assembly to contract in the charter of a corporation, that it shall be exempt from taxation, or, as in the charter of the Georgia Railroad Company, that its tax shall not exceed one-half of one per cent. on its earnings, and that having so contracted, without reservation, it is not competent for a subsequent legislature to violate the obligation of that contract by assessing a higher tax. Nor has there been any legislation accepted by the company since the adoption of the Code which puts this corporation on a footing with the Central and Southwestern Roads, so as that the terms by which it holds its franchises and exemption is a charter granted since the Code and therefore capable of being withdrawn."

This decision is pleaded by the complament here by an amendment to the bill as res judicata, and I think it must be so regarded. It is distinctly held that the tax of the Georgia Railroad & Banking Company shall not exceed "one-half of one per cent. on its earnings;" that this is a contract with the state, and that it is not competent for any subsequent legislature to violate the obligation of this contract by assessing a higher tax. That is what is attempted here, and the decision named clearly holds that this cannot be done. It is a decision, in my judgment, of the same question now before the court, and between the same parties.

In Southern Pacific Railroad v. United States, 168 U. S. 1-48, the rule in reference to res judicata is stated as follows:

"The general principle announced in numerous cases is that the right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, office and issuing the executions upon said branch railroad and the property held in connection therewith, to which intervenor is entitled. Intervenor has applied to said comptroller defendant in original bill, for its proper certificate and tax executions against complainant and said property embraced by said branch railroad for the years from 1897 to date inclusive, which defendant under the restraining order heretofore set forth declined and still declines to do, said defendant asserting that under said order he is forbidden to issue any executions whatsoever in the premises.

XIV. By reason of said injunction and restraining order intervenor is denied its taxes, its tax execution and the collection of its taxes now due by complainant and outstanding against said branch railroad.

Wherefore intervenor prays that said order be revoked or so modified as to permit the defendant in original will to issue to intervenor the tax executions and certificates as hereinbefore set forth, that said defendant be authorized to issue same, that intervenor be no longer hindered in any manner in the collection or enforcement of its taxes under the suit herein and for such other and further relief as may to the court seem meet and proper.

And your intervenor will ever pray.

F. H. Collier, Ligon Johnson, Wm. Wynne, Att'ys for Intervenor.

STATE OF GEORGIA, County of Wilkes:

D. S. Standard being duly sworn on oath says that he is Commissioner of Road- & Revenues of Wilkes county, intervenor in the foregoing and hereinbefore styled cause; that he has read the foregoing intervention and that same is true of his own knowledge except as to matters stated [fol. 64] upon information and belief and those he believes to be true.

D. S. Standard, C. R. & R.

Sworn to and subscribed before me this 9th day of March 1906. F. W. Gilbert, Notary Public, Wilkes Co., Ga.

OEDER

Let the intervention be filed without predujice and served upon the Georgia Railroad & Banking Co. by their solicitor of record.

This March 14th, 1906.

Wm. T. Newman, U. S. Judge.

Filed in Clerk's office March 14th, 1906. O. C. Fuller, Clerk.

SERVICE

Served copy of foregoing intervention upon Alex C. King, of King, Spalding & Little this 19th day of March, 1906, they being solicitors of record for the Georgia Railroad & Banking Co.

Ligon Johnson.

DEMURRER OF WILKES COUNTY, GEORGIA

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTH-ERN DISTRICT OF GEORGIA

No. 1192. In Equity

GEORGIA RAILROAD & BANKING COMPANY

VS

WM. A. WRIGHT et al.

Now comes the defendant Wilkes County Ga. by leave of the Court and hereby adopts the demurrers and pleas herein of file of the defendant, Wm. A. Wright, as its own and as fully and completely as if the same were specified, reiterated and filed in exact words.

F. H. Collier, Wm. Wynne, Ligon Johnson, Attoney- for Wilkes County, Ga.

Filed in Clerk's Office 3rd day of July 1907. O. C. Fuller, Clerk, By J. D. Steward, Deputy Clerk.

[fol. 65] Answer of Wilkes County, Georgia

In the Circuit Court of the United States for the Northern District of Georgia

No. 1192. In Equity

GEORGIA R. R. & BKG. Co.

VS.

WM. A. WRIGHT et al.

Comes Wilkes County Ga. defendant herein by leave of the Court, its demurrer and pleas herein having been overruled, and files its foregoing petition of intervention herein as its answer in this case.

F. H. Collier, Wm. Wynne, Ligon Johnson, Att'ys for Def't Wilkes Co. Ga.

Filed in Clerk's Office 3rd day of July 1907. O. C. Fuller, Clerk, by J. D. Steward, Deputy.

INTERVENTION OF TALIAFERRO Co., GEORGIA

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTH-ERN DISTRICT OF GEORGIA

No. 1192. In Equity

GEORGIA RAILROAD & BANKING CO.

VS.

WM. A. WRIGHT; TALIAFERRO COUNTY, GEORGIA, Intervenor

Comes the county of Taliaferro and leave of the Court to intervene in the above numbered and entitled cause being first had and obtained, files this its intervention therein, and thereupon petitioner shows:

To the Judges of the Circuit Court of the United States, for the Northern District of Georgia, sitting in equity.

I. Intervenor is a duly constituted and qualified county of the State of Georgia, the complainant a corporation and

citizen of Georgia and the defendant a citizen of Georgia and resident of the northern district thereof.

II. Intervenor, as such county as aforesaid, is entitled to its proper, uniform and ad valorem tax upon all property within its confines.

III. Among the property so subject to its tax is the branch railroad from the town of Barnett upon the main line of [fol. 66] the Georgia Railroad, to the county line of Wilkes County, into which county and to the town of Washington said branch railroad extends, the said branch railroad being the property of complainant in original bill.

IV. The said complainant has heretofore refused and still refuses to return for taxation or pay any tax whatever upon said branch railroad.

V. Complainant in original bill is due intervenor its taxes upon said road from and for the year 1897 up to the present time. These taxes complainant has refused and still refuses to pay, claiming to base its refusal upon an alleged tax exemption under the charter of said complainant. Intervenor asserts that no exemption whatsoever now exists or has ever existed as to said branch railroad or any stock or property owned, held or connected ther-with under any act chartering or authorizing said road, nor is same in any manner exempted under the charter of complainant in original bill or under the laws of the State of Georgia, but avers on the contrary, the statutes and laws of the State of Georgia now declare and have at all times declared said railroad to be taxable in the same manner and to the same extent as other property within said county.

VI. Intervenor further avers that the charter amendment of complainant in original bill (Acts of Georgia 1849-50, page 239) under which complainant was vested with what legal authority in connection with said branch road, declared in terms that no exemption should exist in connection with the taxation thereof; that under the subsequent act also authorizing the Washington Rail and Plank Road Company to construct said road (Acts of Georgia 1850, page 219), no exemption was given.

Said road was authorized and constructed under the authority of said acts and said acts alone, and it was there-

under and under all subsequent laws of Georgia subject to taxation like other property within said county.

VII. Intervenor asserts that had said branch road been exempt under prior acts, which intervenor here denies, the consolidation of such branch road and the Washington Rail and Plank Road Company with complainant, under complainant's charter and the act authorizing such consolidation (Acts of Georgia 1851-2; page 120) specially revoked any previous exemption which said branch road or the complainant or others may have theretofore asserted or claimed. The charter amendment heretofore specified of complainant in original bill together with said act authorizing consolidation denv any and all exemption from taxation to complainant in original bill so far as said branch railroad and any and all stock issued or property owned or held in connection therewith. Said branch road was consolidated with complainant in original bill and acquired, held and operated by it only under and by virtue of said acts.

VIII. Intervenor further avers that any exemption which may have existed under the charter and amendments of complainants, which exemptions intervenor asserts do not now nor have they ever applied to said branch railroad, were only for the terms of thirty six years from the completion of the main line of said complainant from Augusta [fol. 67] to the point in said charter specified, which road was so completed about the year 1845, that is to say from the years 1846 to 1882, inclusive, and that since the year 1882 no exemption what soever has existed under the charter of complainant in original bill.

IX. Intervenor further submits that the right to exclusive use by complainant of said Georgia railroad and roadway was only for the period in the preceding paragraph specified, that is until the year 1882, the State of Georgia and the counties through which said road runs having concurrent rights to said road and the use thereof; that said complainant can and has exercised exclusive use of said railroad only under such terms and conditions as the state of Georgia and said counties may have fixed and particularly with reference to the taxes levied or permitted under the general law of the State of Georgia.

X. On the — day of January 1904, complainant filed its bill herein for injunction against the defendant, seeking to restrain the defendant in the issuance of any tax executions based upon the assessment under the act of the legislature of Georgia, commonly known as the 'franchise tax act' and further to restrain the defendant from issuing any tax executions or fi. fa.'s, whatsoever against said complainant, and whereupon this honorable court passed the following order:

"Upon considering the bill of complaint in the above stated cause, it is ordered that the defendant therein named, Wm. A. Wright, do show cause before me on Saturday the 30th day of January, 1904, at ten o'clock a. m. or so soon thereafter as counsel can be heard, at the United States Court House in the city of Atlanta Georgia, why the injunction prayed for thereunder should not be granted; and in the mean time until the further order of the court the said defendant Wm. A. Wright is restrained as prayed for in said bill"

which restraining order is still outstanding in full force and effect and said defendant thereunder enjoined from issuing the executions to which intervenor is entitled.

XI. The tax executions upon railroad property in the state of Georgia are and must be, as required by law, issued by the Comptroller of the state and by him delivered to the several counties entitled to the same, including executions said ranch railroad and property of said complainant to which intervenor is entitled.

XII. The defendant in original bill is Comptroller of the State of Georgia and the said injunction and restraining order prevent his exercising the functions of his said office and issuing the executions upon said branch railroad and property held in connection therewith to which intervenor is entitled. Intervenor has applied to said Comptroller, defendant in original bill, for its proper certificate and tax execution against complainant and said property embraced by said branch railroad as aforesaid for the years from 1897 to date, inclusive, which defendant under the restraining order heretofore set forth refused and still refuses to issue, said defendant asserting that under said order he is

forbidden to issue any executions whatsoever in the premises.

[fol. 68] XIII. By reason of said injunction and restraining order intervenor is denied its taxes, its tax execution and the collection of its taxes now due by complainant and outstanding against said branch railroad.

Wherefore intervener prays that said order be revoked or so modified as to permit the defendant in original bill to issue to intervener the tax executions and certificates as hereinbefore set out and that said defendant be authorized to issue same and for such other and further relief as may to the court seem meet and proper.

And your intervener will ever pray.

S. H. Sibley, J. H. Beasley, Howes Cloud, Ligon Johnson, For Intervener.

STATE OF GEORGIA, County of Taliaferro:

C. W. Caldwell being duly sworn on oath says that he is one of the Commissioners of Roads and Revenues of Taliaferro county Georgia, intervener in the foregoing and hereinbefore styled cause; that he has read the foregoing intervention and that the same is true of his own knowledge except as to matters stated upon information and belief and those he believes to be true.

Sworn to and subscribed before me this — day of March 1906.

C. W. Caldwell.

C. H. Goluck, Clerk Supr. Court, Taliaferro Co., Ga.

Order

Let this intervention be filed without predujice and served upon the Georgia Railroad & Banking Co. by their solicitors of record.

This March 14th, 1906.

Wm. T. Newman, U. S. Judge.

Filed in Clerk's Office March 14th, 1906;

O. C. Fuller, Clerk,

Service°

Served copy of foregoing intervention upon Alex C. King of King, Spalding and Little solicitors of record of the Georgia Railroad & Banking Co. this 19th day of March 1906.

Ligon Johnson.

[fol. 69] Answer of Taliaferro County, Georgia

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTH-ERN DISTRICT OF GEORGIA

No. 1192. In Equity

GEORGIA RAILBOAD & BKG. Co.

VS.

WM. A. WRIGHT

Comes the defendant Taliaferro County Georgia, its demurrers and pleas herein having been over-ruled and files this petition of intervention herein as its answer in the

> S. H. Sibley, J. H. Beasley, Howes Cloud, Ligon Johnson, Attorneys for Def't Taliaferro Co. Ga.

Filed in Clerk's Office 3d day of July 1907.

O. C. Fuller, Clerk, By J. D. Steward, Deputy.

Demurrer of Taliaferro County, Ga.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

No. 1192. In Equity.

GEORGIA RAILROAD & BANKING COMPANY

VS.

WM. A. WRIGHT, et al.

Now comes the defendant Taliaferro County Ga. by leave of the Court and hereby adopts the demurrers and pleas herein of file of the defendant Wm. A. Wright as its own and as fully and completely as if same were specified, reiterated and filed in exact words.

S. H. Sibley, J. H. Beasley, Howes Cloud, Ligon Johnson, Attorneys for Taliaferro County Georgia.

Filed in Clerk's Office 3rd day of July 1907.

O. C. Fuller, Clerk, By J. D. Steward, Deputy.

[fol. 70] Order Making Wilkes and Taliaferro Counties Party Defendants

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTH-ERN DISTRICT OF GEORGIA

No. 1192. In Equity

GEORGIA RAILROAD & BANKING COMPANY

VS.

WM. A. WRIGHT; TALIAFERRO COUNTY, GEORGIA, WILKES.
COUNTY, GEORGIA, Interveners

Upon motion and without objection, it is ordered that the interveners Wilkes and Taliaferro Counties, Georgia, may be, and they are hereby made party defendants herein; that they may be, and are hereby permitted to adopt the demurrers and pleas of the defendant Wm. A. Wright, as their own, and that their petition- of intervention may be,

and are hereby permitted to be filed by said Wilkes and Taliaferro Counties as their answers in this cause.

This the 3 day of July 1907.

Wm. T. Newman, U. S. Judge.

Filed in Clerk's office 3rd day of July 1907.

O. C. Fuller, Clerk, By J. D. Steward, Deputy.

Order Over-ruling Demurrers

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

No. - In Equity

GEORGIA RAILROAD & BANKING COMPANY

TR.

WILLIAM A. WRIGHT, Comptroller General; County of WILKES & COUNTY OF TALIAFERRO

The demurrers of the defendants to the bill of complainant coming on for hearing, and counsel being fully heard, it is now

Ordered and adjudged by the court that said demurrers be each and all overruled, and that defendants answer over.

This the 3rd day of July, 1907.

Wm. T. Newman, U. S. Judge.

Filed in Clerk's Office 3rd day of July 1907.

O. C. Fuller, Clerk, By J. D. Steward, Deputy.

[1.1.71] Order Overruling Special Pleas

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHEBN DISTRICT OF GEORGIA

No. -. In Equity

GEORGIA RAILROAD & BANKING COMPANY

VS.

WILLIAM A. WRIGHT, Comptroller General; County of WILKES & COUNTY OF TALLAFERRO

The special pleas of the defendants to the bill in this case coming on for hearing, and counsel having been fully heard, it is ordered that the said pleas be each and all overruled.

This the 3rd day of July 1907.

Wm. T. Newman, U. S. Judge.

Filed in Clerk's Office 9rd day of July 1907.

O. C. Fuller, Clerk, By J. D. Steward, Deputy.

Stipulation of Counsel

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTH-ERN DISTRICT OF GEORGIA

In Equity

GEORGIA R. R. & BANKING CO.

VS.

W. A. WRIGHT, COUNTIES OF WILKES & TALIAFERRO

There being some doubt as to the proper practice in entering an appeal in this case, it is stipulated among the parties hereto by their respective solicitors that no objection or exception will be taken to any appeal because the same is joint, when it should be several, or vice versa, such question being hereby waived.

This July 3, 1907.

Jos. B. Cumming, Complainant's Solicitor. Jno. C. Hart, For Defendant W. A. Wright. Ligon Johnson, For Def'ts Wilkes and Taliaferro Counties.

Filed in Clerk's Cffice 3rd day of July 1907.
O. C. Fuller, Clerk, By J. D. Steward, Deputy.

Answer of Wm. A. Wright

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

No. 1192. In Equity

GEORGIA RAILROAD & BANKING COMPANY

VA.

WM A. WRIGHT

The answer of the above named defendant to the bill of

complaint of the above named plaintiff.

This defendant now and at all times hereafter saving to itself all and all manner of benefits of exception or otherwise that can or may be had or taken to the errors, uncertainties or imperfections in said bill contained, for answer thereto, says:

- 1. Respondent admits as true the allegations contained in paragraphs 1 and 2 of complainant's bill as to citizenship and residence of the parties therein named, and that the amount involved exceeds the sum of \$2,000.00; but denies that the controversy arises under the Constitution or laws of the United States.
- 2. Respondent admits as true the allegations in paragraphs 3, 4, 5, 6, 7 and 8, containing a recital of the historical facts connected with the formation and creation of complainant.
- 3. Respondent believes and hence admits as true the allegations in paragraph 9 as to the length of the main railroad and its branches, that is to say the total length of complainant's road is 229 miles.
- 4. Respondent denies the allegations in paragraph 10 contained. Respondent admits that subscribers for stock of said railroad in payment of their said stock paid to said corporation \$4,156,000.00 and that this sum went into the purchase of right of way, rolling stock, equipment and improvements, together with other large sums received from income, profits, rents and surplus, the banking business of complainant, and other sources. Respondent avers the total value of the property of complainant amounts to the sum of

\$11,000,000.00 which property and value is separate and distinct from the shares of stock owned and held by the stockholders of complainant. Respondent denies that said stock is invested in said property or otherwise, but avers that said stock is owned and held by the various shareholders of said road. Respondent denies that the payments for stock or any other funds were invested in the franchises of said corporation, but avers that the same were granted without consideration, from the State, other than to create subject to its right to tax same under its general power. Respondent further denies that the 440 shares of stock admitted by the complainant, as liable to taxation, are of the value of \$44,000.00 but avers the same to be of the value of \$118,800.00. Respondent denies that the net earnings of the property of said road constitutes the basis of any taxation, but submits that said property is taxable in the same manner and at the same rate as property in the State of Georgia, [fol. 73] and that said charter exemption was only intended for and applied to the shares of stock in the hands of the shareholders and owners thereof.

5. Respondent further answering says that the original capital subscribed, to wit; \$4,156,000.00 was invested in pursuance of the charter and that section 15 is a covenant made between the State and the stockholders in said corporation and by which contract the rate of taxation on the "stock" is fixed and inviolate. Respondent admits that the State is bound by the contract as therein expressed, viz: "that the stock of said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads, or any one of them; and after that shall be subject to a fax not exceeding one-half of one per cent per annum on the net proceeds of their investments" But respondent denies by the terms of said contract that the contention and conclusion of complainant is true in its assertion and claim as set forth in paragraph 11, that the State bound itself never to impose and levy a direct tax on the property in which said subscriptions were invested, but to receive in lieu of all taxes and burdens on said property, one-half of one per cent on the net proceeds of said investments. Respondent insists that the covenantmade was with the stockholders and the limitation of the tax rate was upon the shares of stock in his hands, and denies that the covenant was a limitation of the tax rate on the

property of the corporation or its net income, and says that said property is liable as such to an ad valorem tax as all other property in the State of Georgia, not exempted by the Constitution.

- 6. Respondent believes it to be true as alleged in paragraphs 12 and 13 of complainant's petition that it has, whenever it has earned a net dividend, paid the State taxes on the basis of net income, but denies that its immunity from taxation on its property has been due alone to that construction of the contract and for that length of time, for it has been of only recent date that any railroad property in Georgia was taxed "ad valorem." The Act taxing railroad property in Georgia "ad valorem" for State, county and municipal purposes began first in 1874 for State purposes, and culminated in 1888 for State, county and municipal taxation.
- 7. Respondent admits the allegations in paragraph 14 touching the return of complainant's property for taxation and the refusal of respondent as comptroller General of the State to receive the return on the basis of one half of one per cent on the net proceeds of the railroad company's investments and he comanded that the property should be returned for taxation at its true market value and still insists that the property of the railroad company as such is liable to taxation as other property in Georgia, to wit, ad valorem.
- 8. The allegation in paragraph 15 as to the passage by the General Assembly of the Act entitled "An Act to provide for and require the payment of taxes on franchises, and to prescribe the method of payment and return of said taxes", is true.
- 9. Respondent also admits as alleged in paragraph 16 that complainant made the return marked exhibit B in his origifol. 74] nal petition under protest except as to the \$44,000.00 as aforesaid, which it admits is subject to a property taxation. Respondent denies that a return of \$44,000.00 as representing the subscription of stock of said company under the Act of 1868 was a fair and just return, but that said stock being worth now \$270.00 per share it should have been returned at \$118,800.00 as so much property for taxation at the general rate.

- 10. Respondent admits the allegations in paragraph 17, that complainant has offered to pay one-half of one per cent on the net earnings of the trailroad company, and that respondent has refused to accept this payment and insists that complainant is liable for taxation on its property at the general rate fixed by the State for State purposes and the rates fixed by counties and municipalities through which complainant operates its said railroad and that the property and a franchises of said railroad company are liable to taxation at such combined rate.
- 11. Respondent denies the allegations in paragraphs 18 and 19, that the railroad property and its branches are exempt from taxation in excess of one-half of one per cent on its net earnings and further denies that the Constitution of the State and the laws in pursuance thereof making liable to taxation its property, impair the obligation of the marter contract of complainant; it being the insistence of respondent that by section 15 of the Act of 1833 chartering said company, the contract was with the stockholder and related solely to the shares of stock, and was not a contract not to tax the property of the complainant.
- 12. Respondent admits the allegation in paragraph 20, that he was seeking to collect the excess in value of complainant's property over and above the original subscription, which excess in value, according to the return of complainant is \$1,999,756.00 and is liable to taxation at the general rate; and he now insists not only such excess is liable to taxation ad valorem and at the general rate, but that all of complainant's property is liable to taxation ad valorem and at the general rate fixed upon other property.
- 13. Respondent admits the allegations in paragraphs 21 and 22, viz: that he insists that the franchises of complainant is liable to State, county and municipal taxation and he admits that he was proceeding and would have collected the taxes thereon at the general rate levied or property in this State except for the restraining order of this Honorable Court, believing and insisting that said property is so liable for taxation as other property in this State.
- 14. Respondent admits the taxes demanded by him of the complainant are in excess of one half of one per cent on the net earnings of the complainant, but denies that the char-

ter of complainant is a contract between the complainant and the State not to demand an ad valorem tax on the property of the complainant. Respondent believes to levy tax on the stock of the shareholders in excess of one half of one per cent on their net investments would be to impair the obligation of the legislative contract, but he is not seeking to levy and collect any tax whatsoever upon the stock [fol. 75] of the shareholder, but he was proceeding to levy and collect taxes on the property of the complainant at the rate fixed by law upon all other property in this State.

- 15. Respondent further answering says it is not true as alleged in paragraph 24 that he has demanded that the property of complainant shall be returned at a higher valuation than other species of property in the State is returned for taxation and he denies it to be the practice of taxing officers of this State to receive other species of property of citizens of this State for taxation at a less percentage than the property of railroads is required by this respondent to be returned for taxation. Further answering says that if any officer charged with the duty of receiving property for taxation in Georgia treats railroad property as to valuation otherwise than all other property is treated, that such officer does so in violation of law, for it is expressly provided by the Constitution of this State that all taxes shall be uniform and ad valorem.
- 16. Respondent admits the allegations in paragraph 25 relative to the returns of property for taxation by railroad companies, but denies the conclusion reached by complaint in paragraph 28, that the owners of said railroad property in being required to comply with the law touching the return of "franchises" for taxation, has, or is, being denied the equal protection of laws.
- 17. Respondent further answering says as alleged in the original petition that he is the Comptroller General of the State of Georgia, and as such it is his duty to require and receive the returns of railroad property for taxation. He has proceeded to assess and collect the taxes due by the complainant to the State of Georgia on its property and franchises, when restrained by this Honorable Court. It is the insistence of respondent that under the provision in question, to wit; section 15, of complainant's charter, that the covenant touching taxation was and is a contract be-

tween the stockholder and the State and related to the shares of stock. He prays the Court, since it now has jurisdiction of this entire case, in order that respondent may properly exercise his duty in the premises as Comptroller General, that this Court will construe Section 15 of the charter of complainant, or so much thereof as relates to the subject of taxation. Respondent submits his contentions and Taxokes the judgment of the Court thereon as follows:

First. That the provision made in section 15, as follows "The stock of said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads or any of them; and after that, shall be subject to a tax not exceeding one-half per centum per annum on the net proceeds of their investments," is a covenant that the stock or shares shall not be taxed exceeding one-half per cent on the net proceeds of their investments, and is not a limitation of the tax rate on the property of complainant.

Second. If the Court should construe the limitation to refer to the original subscription, whether in stock or as an investment, then it is the insistence of respondent that the excess of property over and above such original subscription is liable to taxation at the general rate. That is to say [fol. 76] the original capitalization being \$4.156,000 is liable to taxation at the rate of one-half of one per cent on the net proceeds of the investment, and the excess of property as shown by the return of complainant, to wit, \$1,999,756 is subject to taxation as so much property for State, county and municipal purposes as provided by the Act of 1874.

Third. Should the Court construe the word "stock" as meaning a covenant with the State to tax neither the stock of the shareholder or the capital stock of the company beyond the limit therein fixed, it is insisted that the element of franchise granted the company, as such is property not protected by charter, and should be taxed at the general rate.

Fourth. It is the insistence of respondent that the \$44,000 represented by 440 shares of stock issued by virtue of the Act of 1868, should not be returned as \$44,000 as so much stock for taxation, or as representing that much property for taxation, but since the shares of stock of said railroad company is now worth on the open market \$270.00 per share,

the return should be \$118,800 as so much property for taxation, and it should be decreed that the complainant is liable to taxation for State, county and municipal purposes as a return of property for that amount.

Fifth. It is further insisted that the \$325,000 surplus money now on hand as shown by Exhibit B under the return of the complainant is liable to taxation as so much property at the general rate.

18. Respondent having fully answered submits that the injunction awarded against him by this Honorable Court on the — day of January, 1904 should be dissolved and that said bill ought to be dismissed with costs in this behalf expended.

Jno, C. Hart, Counsel for Defendant.

GEORGIA,

Fulton County:

You, Wm. A. Wright, defendant in the above stated case blo swear that the foregoing answer is true to the best of your knowledge and belief, so help you God.

Wm. A. Wright, Defendant.

Sworn to and subscribed before me this 3 day of March; 1904.

W. H. Harrison, N. P., Fulton Co. Ga.

Filed in Clerk's office July 3, 1907.

O. C. Fuller, Clerk.

[fol. 77] Amendment to Answer of Wm. A. Wright

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTH-

In Equity

THE GEORGIA RAILEOAD & BANKING COMPANY

VS.

WM. A. WRIGHT

And now, before decree in said case, and not waiving the demurrers and pleas of file in the case, but with all the reservations made in the original answer, comes the defend-

ant, and by leave of the court amends his answer to paragraph 10 of the petition as follows, to-wit:

Defendant avers that the property of the complainant, in its return for taxation exhibited in the petition, except as to the road bed and a portion of the other reality, is not the property in which the capital of said company was originally invested, but that the rails and ties of the main lines of the tracks then constructed have been many times replaced by new ones, each time the track being made heavier and more valuable, so that the track is now worth at least double its original value, and the buildings appurtenant to said railroad have been renewed and enlarged from time to time, and new stations, depots and office buildings have been from time to time erected, so that the present value of these is many times what the value of the original buildings was; and the original engines, cars, and other rolling stock have long since been worn out or discarded, and new engines and cars and other rolling stock have been purchased, much more humerous, and many times more efficient and valuable than heretofore; that new and valuable appliances for track repairs, for removing wrecks, shops for the building and repair of rolling stock, and other tools and appliances have been from time to time purchased and added to the property of said complainant; and that while the number of miles of main line is still the same as originally, extensive purchases of additional lateral right of way have been recently made, and many miles of new side tracks constructed, and extensive vards and track facilities constructed at both termini of the road. By reason of which things defendant avers that not only has the value of the property of complainant been greatly enhanced but its identity and substantial character materially changed. Defendant further avers at the close of the Civil War in 1865, the railroad of complainant was in parts wholly demolished, and much of its property swept away, and its restoration even to its original condition involved a large outlay of funds. Defendant avers that funds to make these additions and betterments were in part obtained from accumulations of profits of the complainant's enterprise which were by it reinvested therein, in part from the sale of said 440 shares of new stock in the petition mentioned, and in part from the sale of bonds of the complainant. Defendant contends that in no event should the entire present property of complainant

at its present value be declared exempt from all tax except [fol. 78] that in the said 15th section of its charter mentioned, and defendant absolutely enjoined from collecting any other tax, but that said section should be construed, and if found to protect any of the present property of complainant from property taxation, defendant should be adjudged free to assess and tax such property and values as age not so protected, from year to year, and under such machinery as is by the laws provided.

John C. Hart, Attorney General, Solicitor for W. A. Wright.

Georgia, Fulton County:

In person appeared before me a person authorized to administer an oath, the defendant W. A. Wright, who being duly sworn, says that he has read the foregoing amendment to his answer as well as the original answer in said case and that the statements of fact in said amendment and answer are true.

Wm. A. Wright.

Swern to and subscribed before me this July 3rd, 1907: W. H. Harrison, Notary Public, Fulton Co., Ga.

ORDER.

By special leave of the court, all parties consenting, ordered that the within amendment be allowed and considered as a part of the original answer.

July 3, 1907.

Wm. T. Newman, U. S. Judge.

Filed in Clerk's office July 3rd, 1907.

O. C. Fuller, Clerk.

Final Decree

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTH-ERN DISTRICT OF GEORGIA

No. - In Equity

THE GEORGIA RAILROAD & BANKING COMPANY

VS.

WILLIAM A. WRIGHT, Comptroller General

BILL FOR INJUNCTION, ETC.—Filed January 7th, 1904

This cause coming on to be heard upon the bill of complaint of the Georgia Railroad & Banking Company vs. William A. Wright, Comptroller General, and amendments thereto and the exhibits to the same, and the answer and [fol. 79] amendment thereof interposed thereto by the defendant, William A. Wright, Comptroller General, and upon the answer of the defendant Wilkes County, and upon the answer of the defendant Taliaferro County, it is

Considered, ordered and adjudged by the court that the Charter of the complainant, to wit; the Act of the Legislature of Georgia of December 21st, 1833, and various other Acts of saids Legislature, passed prior to the 1st day of January, 1863, is a valid and binding contract between the State of Georgia, and complainant the Georgia Railroad

& Banking Company;

That the said Charter covers complainant's main railroad between the cities of Augusta and Atlanta, in said State one hundred and seventy-one miles; its branch railroad. between Barnett and the City of Washington, in said State, eighteen miles; and its branch railroad between Union Point and the City of Athens, said State, forty miles; and all of . the appurtenances of said railroad including their rolling stock; also complainant's franchise to be a corporation and other franchises without reference to the caluation of all of said property; which valuation it is admitted exceeds by four millions of dollars the nominal value of the capital stock of said Company, said excess being produced by natural increase in the value of said property and by renewals, alterations and betterments of the same from time to time by the complainant. The said Charter provides a system of taxation for said property exclusive of

all other taxation, to wit; one half of one per cent of the net earnings of said property.

That all property of complainant other than that above: specified including so much of said property as is represented by four hundred and forty shares of stock subscribed under the Act of Oct. 5. 1868, is highle to taxation under the general laws of the State of Georgia.

It is further ordered, adjudged and decreed that defend and be perpetually enjoined from levying and collecting any taxes, State, county or municipal from said complain-

ant not in accordance with this decree.

This the 3rd day of July, 1907.

Wm. T. Newman, U. S. Judge.

Filed in Clerk's office 3rd day of July 1907. .O. C. Fuller, Clerk. By J. D. Steward, Deputy:

UNITED STATES OF AMERICA:

The President of the United States to the Georgia Railroad and Banking Company and Joseph B. Cumming and A. C. King, its attorneys, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the Circuit-Court of the United States for the Northern District of Georgia, wherein William A. Wright, The County of Wilkes, and [fol. 80] The County of Taliaferro are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said appeal mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this tenth day of January, A. D. 1908, and of the independence of the United States the One Hundred and Thirty

Wm. T. Newman, United States District Judge, Presiding in the Circuit Court Aforesaid.

di.

Attest: O. C. Fuller, Clerk, by W. C. Carter, Deputy Clerk.

Service of the above Citation, and receipt of a copy, admitted this 10 day of Jan'y, 1908.

Jos. B. Cumming, Alex. C. King, Solicitors for The Georgia Railroad and Banking Company, Appellee, Complainant in the Lower Court.

Filed in Clerk's Office 10th day of Jan'y, 1908.

O. C. Fuller, Clerk, by W. C. Carter, Deputy.

[Endorsed:] Circuit Court of United States, Northern District of Georgia. The Georgia Railroad & Banking Company vs. Wm. A. Wright, County of Taliaferro, County of Wilkes. Citation for appeal. Filed in Clerk's office Jan'y 19, 1908. O. C. Fuller, Clerk, by W. C. Carter, Dep. Clerk.

Appeal

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTH-ERN DISTRICT OF GRORGIA

In Equity

THE GEORGIA RAHLROAD AND BANKING COMPANY

VS.

WILLIAM A. WRIGHT and THE COUNTY OF WILES and THE COUNTY OF TALIAFERRO

The above named respondents, William A. Wright, The County of Wilkes, and the County of Taliaferro, considering themselves aggreed by the order and decree made and entered in the above stated court in the above stated case, on the third day of July, 1907, whereby it was ordered, adjudged and decreed that the Acts of the Legislature of Georgia of Dec. 21, 1833, and the various other acts of said legislature, passed prior to the 1st day of Jan. 1863, and constituting the charter of the complainant company, are [fol. 81] a valid and binding contract between the State of Georgia and the said complainant, the Georgia Railroad and Banking Company; that the same covers the roads of said complainant therein mentioned, with an appurtenances,

including rolling stock and the franchise to be a corporation, without reference to the valuation of said property; that said charter provides a system of taxation of said company exclusive of all other taxation, to wit; one half of one per cent. of the net earnings of said property; and that the defendants be perpetually enjoined from levying any taxes, state, county or municipal, from complain int not in accordance with this decree—do hereby appeal from said order and decree of July 3, 1907, to the Supreme Court of the United States for the reasons specified in the assignment of errors filed herewith, and they pray that this appeal may be allowed, and that a transcript of the record, papers and proceedings upon which said order and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Jno. C. Hart, Sam'l H. Sibley, Solicitors for Respondents Wm. A. Wright. Ligon Johnson, Sam'l H. Sibley, Solicitor- for Respondents County of Wilkes and County of Taliaferro. Hooper Alexander, Solicitor for Respondent William A. Wright.

Filed in Clerk's Office 10th day of Jan'y, 1908.

O. C. Fuller, Clerk, by W. C. Carter, Deputy.

· Order Allowing Appeal

The foregoing petition for appeal is granted, and the claim of appeal therein made is allowed.

This January 10th, 1908.

Wm. T. Newman, Judge of the District Court for the Northern District of Georgia and Presiding in said Case.

Filed in Clerk's Office 10th day of Jan'y, 1908.

O. C. Fuller, Clerk, by W. C. Carter, Deputy.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTH-ERN DISTRICT OF GEORGIA

In Equity

THE GEORGIA RAILBOAD AND BANKING COMPANY

VIS.

WM. A. WRIGHT and THE COUNTY OF WILKES and THE COUNTY OF TALIAFERRO

Know all men by these presents that we, Wm. A. Wright, The County of Wilkes and the County of Taliaferro, as principal and R. E. Park as security are held and firmly bound ounto the Georgia Railroad and Banking Company in the sum of Five hundred dollars to be paid the aforesaid, Georgia Railroad and Banking Company, its successors or assigns; to which payment well and truly to be made we bind ourselves, our successors, heirs, executors and administrators firmly by these presents.

Sealed with our seals and dated this 10th Jany. 1908.

Whereas the above named respondents Wm. A. Wright, County of Wilkes and County of Taliaferro have appealed to the Supreme Court of the United States from a decree in favor of the above named complainant, The Georgia Railroad and Banking Company rendered in the above entitled case or July 3, 1907 in the Circuit Court of the United States for the Northern District of Georgia, to reverse said final decree, Now therefore the condition of this obligation is such that if the said appellants shall prosecute their appeal to effect and answer all costs and damages that may be awarded against them or either of them if they or either of them fail to make good their appeal, then this obligation to be void; else of full force and effect.

Wm. A. Wright, R. E. Park, County of Wilkes, County of Taliaferro, by Ligon Johnson & Sam'l H. Sibley, Solicitors.

This bond approved as to form, amount and sufficiency of securities, this 10th Jany. 1908.

Wm. T. Newman, Judge United States District Court, Northern District of Georgia.

Filed in Clerk's Office 10th day of Jany. 1908.

O. C. Fuller, Clerk, by W. C. Carter, Deputy.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

In Equity

THE GEORGIA RAILROAD AND BANKING COMPANY

VS.

WILLIAM A. WRIGHT, THE COUNTY OF WILKES, and THE COUNTY OF TALIAFERRO

And now come the respondents, and file the following assignment of errors particularly stating the errors on which they and each of them will rely in the prosecution of their apper from the decree made in the above entitled cause by this honorable court on July 3, 1907.

It The court erred in not sustaining the first paragraph of respondent's demurrer to the bill as amended, alleging that the amended bill presented no federal question, was a suit between citizens of the same state, and the court was without jurisdiction; because by said amendment the complainant alleged that the entire cause was estopped by a former judgment therein set up, and the existence and effect of an estoppel by judgment of a state court between the same parties is not a federal question. The court should have declined to entertain the amendment, as one tending to oust the court of jurisdiction of the cause; or, having allowed it, should have dismissed the bill for want of jurisdiction.

2. The court erred in not sustaining the second paragraph of respondent's demurrer, that the complainant, by its own showing, was not entitled to the relief prayed; because the petition, construed with the public laws affecting the complainant's charter, and the constitution and laws of the State on the subject of taxation, showed upon its face that the property of complainant sought to be taxed (including its franchise) was liable to taxation, and was not exempt therefrom under the 15th section of complainant's charter as alleged, and that the respondent W. A. Wright was proceeding lawfully to collect taxes upon the same.

- 3. The court erred in not sustaining the third paragraph of respondent's demurrer, which attacked Paragraph 23 of the bill relating to the effort to tax complainant's franchise under the Act of Dec. 17, 1902; because the franchise sought to be taxed is shown by said bill not to be a part of the property sought to be exempted from taxation by the 15th section of the charter and not to be a part of the "stock of the company" contributed by the corporators, but a value contributed by the State of Georgia; and the said act taxing such franchise is in impairment of no contract with the corporators as alleged.
- 4. The court erred in not sustaining the fourth paragraph of respondent's demurrer to the bill, which averred that by complainant's own showing its present property was largely in excess of the capital stock permitted by the [fol. 84] original charter of complainant, which excess represented accumulated profits, surplus and subsequent investments, and that such excess was not protected by the limitation on taxation in said original charter contained. The original capital stock, as shown by said charter, was \$1,500,000.00. Increase to \$4,000,000 was authorized from time to time under later laws. The court erred in not limiting any exemption from general taxation of complainant's property, as being the equivalent of the "stock" mentioned in the charter to said original \$1,500,000 and in not limiting it to said \$4,000,000 of value.
- 5. The court erred in not sustaining the exceptions filed by respondents to Paragraph 24 of the petition, which paragraph, for the reasons stated in said exception should have been stricken.
- 6. The court erred in over-ruling the plea filed by the respondents; because the decision of the Supreme Court of Georgia in the cases therein set forth was a judgment between the same parties, and was an authoritative construction of the charter of complainant, in accordance with which W. A. Wright was acting in this case. Said construction should have been sustained as an adjudication binding upon the parties.
- 7. The court further erred in over-ruling said plen, because the decision of the Supreme Court of Georgia therein set out was a construction and interpretation by said court in a litigation between the same parties, of the former

decision of said court in the case between said parties which is relied on as an estoppel by the complainant in the amendment of its bill, defining the meaning of said decision, and limiting its application. The meaning and effect of said first decision being a question of general law, and not a federal question, the construction of the same made by the court of last resort of Georgia especially in a case to which complainant was a party, will be observed and respected by this honorable court.

- 8. The court erred in adjudging that the judgment in the case of the Georgia Radroad and Banking Company vs. the State of Georgia which was exhibited in the amendment of the bill was res judicata and conclusive of the issues in this case; because said judgment was pronounced by the courts of the State of Georgia in a contest over the taxes for the year 1874, and under the law of Georgia, the decisions of its courts in matters of taxation are conclusive between the parties only as to the taxes of the year actually involved, and the decisions of said courts will not have a wider effect when urged in the federal courts as an estoppel.
- 9. The court further erred iff adjudging said judgment to be conclusive of the issues in this case as an estoppel, because the pleadings in said former ease show that the. only issues involved therein were (a) Whether the charter of the complainant contained a valid contract of exemption from taxation, (b) Whether the same had been rendered repealable by the acceptance of franchises subsequent to to Jan. 1, 1863 and (c) Whether the Act of 1874 repealing all such exemptions was effectual as to the charter of complainant; and no other issues were actually or necessarily decided. The issues arising in this case as to (a) Whether it was the shares of stock in the hands of the shareholders, or whether it was the capital stock paid in by them that [fol. 85] was protected from taxation; and (b) the issue whether the property of complainant is greater in value than the capital subscribed under said charter, and (c) whether it is not different property from that subscribed, or originally purchased, and (d) has not been increased by additional investment of surplus earnings and proceeds of sale of bonds; were not made and litigated in said prior case, and cannot be estopped by the judgment therein.

- 10. The court further erred in holding said former judgment to be an estoppel of the issue in this suit that the property of the complainant liable to taxation was greatly in excess of the capital subscribed under said charter and under the protection of its tax exemption, and that the original property had been added to and substituted by other, and that large investments of surplus earnings and proceeds of bond sales had been made; because said facts did not appear in said former suit, and the "question sought to be estopped was not necessarily presented and determined upon exactly the same facts."
- 11. The decision of the Supreme Court of Georgia in said former case declared that the investment of the capital stock sold under the Act of 1868 was not protected by the charter. The court below erred in not adjudicating said decision to be an estoppel and conclusive that all other investments made since the original charter and the subscriptions thereunder and since 1863 whether of surplus earnings or the proceeds of bond sales or otherwise, were equally unprotected by the original charter.
- 12. The court erred in decreeing that the limitation of taxation in the complainants charter covered its railroad and appurtenances as mentioned in the decree regardless of their value, because—
- (a) Under a true construction of the charter, the same limited the taxation only of the shares of stock of the shareholders, and not of the property of the corporation.
- (b) If the property of the corporation be protected from taxation at all, the protection extends, under a strict construction of the exemption, only to such a value of property as is measured by the original "stock" authorized by and paid in on the faith of the said charter; betterments, substitutions, enlargements, and further investment of funds from whatever source, are not exempted from general taxation.
- 13. The court erred in decreeing that the right of complainant to be a corporation was protected from taxation beyond the limit fixed in said charter; because said franchise is taxable under the laws of Georgia, and it was in no sense a part of the "stock" contributed by the corporators on the faith of the charter, but was a valuable

property contributed by the State of Georgia itself, as to the taxation of which no stipulation was made.

- 14. The court erred in decreeing that the charter of complainant provided an exclusive method of taxing complainant's property; because (a) the taxation therein provided for was not of the property at all, but of the "stock" and (b) was not exclusive, because applying at most only to such property as represented the money paid in by the corporators, and not to additions, betterments and in[fol. 86] creases due to other investments; or to the franchise of complainant which was contributed by the state.
- 15. The court erred in holding that the branch road of complainant from Barnett to Washington, eighteen miles, was covered by complainants original charter and exempt from other taxation than that provided by said charter; because it was shown that said branch road was constructed under separate legislative authority granted to another company, in which no exemption from or limitation of taxation was provided and because the consolidation of said company with complainant company did not operate to extend the charter exemption from general taxation over said branch road, nor was there any consideration for a grant of such exemption at the time of said consolidation, and because the laws and constitution of Georgia do expressly impose uniform taxation thereon.
- 16. The court erred in adjudging that the original charter of complainant, and such tax exemptions as it may contain, apply to the branch road of complainant from Barnett to Washington, and that the amendments of complainants charter under which it received and constructed said branch road did not subject said branch road and property held in connection therewith, to general taxation.
- 17. The court erred in holding that complainants charter constituted a continuing and continuous contract of exemption from general taxation; and in holding that any such contract has existed or been of force since 1882; and in holding that since the year 1882 the complainant has not held said roads authorized in its charter subject to such terms and conditions as to taxation by the state and its counties and were or might be fixed by the laws of Georgia.
- 18. The court erred in adjudging and decreeing that the respondent Wm. A. Wright be enjoined from collecting

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taxes under the laws of Georgia upon said branch road from Barnett to Washington and its appurtenances; and upon the property of complainant generally in excess of the value contributed under its charter by its corporators; upon its franchise to be a corporation; and upon all the property of complainant not shares of stock in the hands of its shareholders; because the same were each liable to taxation under said laws, and not exempted therefrom

under the Constitution of the United States.

In order that the foregoing assignments may be made a part of the record, respondents present the same to the court, and pray a reversal of the decree and that such disposition be made of the cause as equity and the laws of the United States require.

Jno. C. Hart, Att'y. for W. A. Wright. Ligon Johnson, Sam'l H. Sibley, Solicitors for Wilkes & Taliaferro Counties.

Filed in Clerk's office Jan'y 10th, 1908.
O. C. Fuller, Clerk, By W. C. Carter, Dep. Clerk.

[fol. 87] CIRCUIT COURT, UNITED STATES, NORTHERN DISTRICT OF GEORGIA

In Equity

GEORGIA RAILROAD AND BANKING COMPANY

VS.

W. A. WRIGHT et al.

In the pleadings of the respondents in said case, reference is made to the case of "Goldsmith, Comptroller General vs. Georgia Railroad and Georgia Railroad Company vs. Goldsmith, Comptroller General, reported in the 62 Ga. p. 485 et seq." and in the hearings of the case at bar the record of the cases cited were considered by agreement as exhibited in the pleadings and in evidence before the court and were passed upon by the court. The full record of said cases consists of a fi. fa. each for the taxes for the years 1875, 1876 and 1877 followed each by an identical affidavit of illegality and bond. The three cases thus made were consolidated and tried together, much evidence being introduced which is immaterial here. The decision of the

lower court was excepted to appropriately by each side, and the decision of the Supreme Court of Georgia pronounced, which was thereafter duly made the judgment of the trial court. In order to abridge the record in the case at bar it is stipulated and agreed that the attached transcript contains all the portions of said records material to this case, and that said transcript with this stipulation be made a part of the record in this case, and be transmitted to the Supreme Court of the United States as such

Jos. B. Cumming, Sol. of the Ga. R. R. & B. Co.;

Ligon Johnson, Sam'l H. Sibley, Sol's Counties

Wilkes & Taliaferro; Jno. C. Hart, Sam'l H. Sibley,

Sol'rs for Wm. A. Wright.

Ordered that the foregoing stipulation, and attached transcript be made a part of the record in the case of Georgia Kailroad and Banking Company vs. W. A. Wright, et al.

This January 10th, 1908.

Wm. T. Newman, U. S. Judge.

Transcript of Record, State of Georgia vs. Ga. R. R. & Bk. Co.

Comptroller General's Office.

State of Georgia, Fulton County, to all and singular the Sheriffs and other lawful officers of this State:

You are hereby commanded that of the goods and cuattels, lands, tenements and franchises of the Georgia Railroad [fol. 88] & Banking Company a corporation chartered and doing business in this State, you cause to be made the sum of nineteen thousand and two hundred and one 18/100 (\$19201.18) dollars as its tax for the year 1875, assessed against it upon a return made by the Comptroller General of Georgia, according to law, from the best information he could procure, and the further sum of fifty-seven thousand six hundred and three 54/100 dollars as penalty and costs and that you pay over said sum of money to the Comptroller General of said State, at his office in Atlanta, Ga. and return thereon this execution, with your actings and doings entered thereon.

Witness W. L. Goldsmith, Comptroller General of said State under his official hand and the seal of said office. Issued this the third day of December 1877.

W. L. Goldsmith, Comptroller General of Georgia. (Seal.)

Levied the within fi. fa. upon all that lot or parcel of land with the improvements thereon, situate, lying and being in the city of Augusta, county of Richmond and State of Georgia, bounded north by Walker street, east by Jackson street, south by Fenwick street, west by Campbell street, excepting a strip of land 90 feet wide, between Jackson and Campbell street, belonging to the city of Augusta, and known as Watkins street; also, upon all that other lot, with the building thereon, lying and being in said city, county and State, known as the Georgia Railroad Bank, bounded north by lot belonging to the estate of Molyneaux, east by McIntosh street, south by Broad street, west by lot belonging to the Augusta factory, this 28th day of December 1877.

Charles H. Sibley, Sheriff of Richmond County.

Affidavit of illegality having been interposed by the Georgia Railroad & Banking Company, the levy is stopped. Charles H. Sibley, Sheriff of Richmond County.

STATE OF GEORGIA

VB.

THE GEORGIA RAILROAD & BANKING COMPANY

Comptroller-General's Execution for Tax for the Year 1875.

No. 80. \$19,201.10. Penalty. 57,603.50.

The above described fi. fa. levied by the sheriff of Richmond county on the following property of the defendant, the said Georgia Railroad and Banking Company, to wit; All that lot or parcel of land, with the improvements thereon, situate, lying and being in the city of Augusta, county of Richmond, and State of Georgia, bounded north by Walker street, East by Jackson St. South by Fenwick street, west by Campbell-street, excepting a strip of laud

[fol. 89] 90 feet wide, extending from Campbell to Jackson street, belonging to the city of Augusta, and known as Watkins street. Also all that other lot, with the buildings thereon known as the Georgia Railroad Bank, lying and being in the city of Augusta, county and State aforesaid, bounded north by lot belonging to the estate of Molyneaux, east by McIntosh street, south by Broad street, west by lot belonging to the Augusta Factory. Levied by Charles H. Sibley, Sheriff of Richmond county on the 28th day of December 1877.

And now comes the defendant in said fi. fa. the Georgia Railroad & Banking Company, and says that said fi. fa. levied as above stated, is illegal, and is proceeding illegally; Because it says that the charter of incorporation of this defendant was granted by a public act of the Legislature of Georgia, approved December 21, 1833 by which act, in the 15th section thereof, it is provided and declared that the stock of said company and its branches shall be subject to a tax not exceeding one half per cent. per annum on the net proceeds of their investments.

And the stock of this defendant was subscribed under said charter, and on the faith of its provisions. And the corporators accepted said act of incorporation, and organized under the same, and expended the stock of the company subscribed and paid in by the stockholders in the construction and equipment of said road and branches. And the said provision in said charter has never been repealed or changed by the consent of the defendant; but this defendant has constantly used and enjoyed and exercised the rights, franchises and immunities granted them by their said charter until the passing of the act in this illegality hereinafter complained of and ever since, unless prevented by said act and proceedings under the same.

And this defendant further says that all the property of this defendant on which said tax is assessed, on which said fi. fa. is issued, is the property in which the capital stock of defendant has been invested, and constitutes and is the stock of said company and its branches, and the tax so assessed is a tax on said stock, and far exceeds the amount of one half per centum on the net proceeds of their investments, which last named tax for 1875 is twenty one hundred and twenty eight dollars and thirty nine cents (\$2,128.39) which this defendant has already paid to the Comptroller General of this State.

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. And the defendant further says that there is no valid law of said State under which said tax ft. fa. is issued; and that the act of the Legislature, approved February 28, 1874, entitled "An Act to amend the tax laws of this State so far as the same relates to railroad companies, and to define the liability of such companies to taxation and to repeal so much of the charters of such companies respectively as may conflict with the provisions of this act," is void and of no effect in so far as it attempts to repeal any portion of the charter of this defendant, or to impose another or greater tax than one Half per cent. per annum of the net profits of this defendant's investments, on the stock of this defendant, or the property in which said stock is invested, because said act is in conflict with the Constitution of the United States, as being an act impair-[fol. 90] ing the obligation of a contract, and therefore violates the first paragraph of the tenth section of the first article of the said Constitution of the United States.

And his defendant further says that heretofore, to wit on the 2nd day of October, 1874, the Comptroller General of the State of Georgia, issued an execution against this defendant for tax f. fa. No. 6 upon its property, under the provisions of the said act above referred to, approved the 28th day of February 1874, and on the 3rd day of October 1874 Le said fi. fa. was levied by the sheriff of Fulton county A. M. Perkerson, on the property of this defendant, and on the 20th day of October, 1874, this defendant filed its affidavit of illegality according to the provisions of the third section of said act, and in terms thereof. declaring and setting forth that said fi. fa. was illegal, upon the ground and for the causes above set forth in this affidavit; and that on the 17th day of December, 1874, the said illegality was tried before and by the Superior Court. of Fulton County to which court the same was, by the said act, made returnable, and which court, by the provisions of said act, had jurisdiction to try said illegality; and that on the day and year last aforesaid, the said Superior Court of Fulton County; upon the trial of said cause, ordered and adjudged that the oath of illegality be sustained as to all tax claimed except the tax upon four hundred and forty shares of new stock, valued at ninety-three dollars per share, being the sum of two hundred and four dollars and fifty cents and that the fi. fa. proceed to collect said last named sum, and the further sum of - for costs.

Which decision of the said Superior Court of Fulton county was on the 21st day of December, 1874, carried, by bill of exceptions, at the instance of both parties, to the Supreme Court of the State of Georgia, and at the January . Term 1875, of said Supreme Court, the said decision of. the said Superior Court of Fulton county was by the said Supreme Court affirmed, and the remitt-ur from the said Supreme Court was returned to, and made the judgment of, this Court by the Superior Court of Fulton county, which decision, the defendant says, was rendered in a cause between the same parties as are here at issue, to wit; The State of Georgia against the Georgia Railroad and Banking Company (this defendant); that the said cause embraced, and in the same was wawn in question, among other things, the same subject matter as is here drawn in question to wit; the validity of the charter of this defendant, and particularly the validity of so much of said charter as prohibits the taxing of the stock of this defendant, or imposing upon it any other or greater tax than one half percentum upon the net profits of its, investments; also, the constitutionality of the said act of the Legislature, approved the 28th day of February 1874, and all amendments thereof; and also the power of the State to tax the stock of this defendant or the property in which its stock had been invested; and that the judgment rendered in said cause was rendered by a court having jurisdiction to try the same, and was rendered and said questions were adjudicated in favor of this defendant; and this defendant here pleads the same as a former - recovery and a bar to the present proceedings, and as an estoppel to prevent the State from making the same questions again, and as an end of litigation.

[fol. 91] This defendant further says, that so much of said fi. fa. as is for penalty of fifty-seven thousand six hundred and three dollars and fifty cents, is illegal, because there is no law subjecting this defendant to a penalty for resisting said tax, levied and assessed under said act of February 28th, 1874. And there is no law authorizing the Comptroller General to impose on this defendant any penalty whatever for any cause existing in relation to taxes due by this defendant to the State.

Jos. B. Cumming, Henry Hillyer, for the Ga. R. R. & B. Co.

STATE OF GEORGIA, Richmond County:

You, John P. King, President of the Georgia Railroad and Banking Company do swear that the facts stated in the above and foregoing affidavit of illegality are true.

Jno. P. King, Pres't.

Sworn to and subscribed before me this 22nd day of January, 1878. A. S. Morris, Not. Pub., R. C. Ga.

GEORGIA,

Richmond County:

Know all men by these presents, that the Georgia Railroad and Banking C mpany as principal and Ino. P. King as surety are held and bound unto the Governor of the State of Georgia and his successors, in the sum of one hundred and sixty thousand dollars for the payment of which they bind themselves by these presents.

In witness whereof, the said company hath caused these presents to be signed by its President, and countersigned by its cashier, and sealed with its corporate seal, and the said surety hath hereunto set his hand and seal, this 21st day of January 1878.

The condition of this obligation is that whereas the Comptroller General of the State of Georgia bath issued against the said Georgia Railroad and Banking Company an execution for taxes for the year 1875, for the sum of seventy six thousand eight hundred and four dollars and seventy-two cents (\$76,804.72) alleged to be due from the said company, in the county of Richmond, and said company is about to file its affidavit of illegality to stop the proceeding of said execution.

Now if the Georgia Railroad and Banking Company shall pay said execution so issued for taxes, in case it shall be ultimately adjudged by the courts having jurisdiction of said case, that it is liable to pay the same, then this bond to be void, else to remain in full force.

Signed and sealed in the presence of A. S. Morris, Notary Public, R. C., Ga.

Georgia Railroad and Banking Company, Per Jno. P. King, Pres't. Geo. P Butler, Cashier [L. S.] Jno. P. King. [L. S.] [fol. 92]

Atlanta, Ga., January 5, 1878.

To the Sheriffs and other legal officers of Georgia:

This is to certify that the Georgia Railroad and Banking Company has paid into the Treasury of Georgia, twenty-one hundred and twenty-eight 39-100 dollars (\$2,128.39) same being required by charter of said corporation as its tax on net earnings, for the year ending May 1, 1875, and which under the law, entitles said corporation to file affidavit of illegality to execution issued for said year.

W. L. Goldsmith, Comt. Gen'l.

IN FULTON SUPERIOR COURT, APRIL TERM, 1878

STATE OF GEORGIA

VS.

GEORGIA RAILROAD AND BANKING COMPANY

Fi. Fa. and Affidavit of Illegality

And now comes the plaintiff and demurs to all the grounds of illegality taken by the defendant and prays that the said affidavit of illegality be dismissed and the fi. fa. ordered to proceed on the following grounds;

1st. That said fi. fa. was issued and is proceeding regularly and lawfully to collect the taxes due the State from the defendant, and that none of the grounds of illegality taken by defendant are sufficient in law to arrest or prevent the execution of the same.

2nd. That the defendant not having paid the taxes due the State under her Charter has no status in this court, and no right to plead anything therein.

3rd. That the exemption claimed from taxation in the 15th Section of the Act of Incorporation in 1833 being matter different from the title of the act, is unconstitutional and void.

4th. That said Act of Incorporation gave no exemption to any part of said railroad or its branches, there being no negative words excluding taxing power; but if any exemption it extended to the road to Madison only and Athens, and that all the rest of the stock of said company is by the Charter and amendments subject to taxation at the pleasure of the Legislature, subject only to the restrictions of the organic law:

5th. That said exemption, if good, never exempted but \$1,500,000 of the stock of said road, and that all the rest of the stock, to wit: \$2,700,000 was at the passage of the act, and still is subject to taxation as well as all the bank stock, to wit: \$500,000 and all other property of said road except the said \$1,500,000 of stock under the said 15th section of said act. (Secact of 1833.)

6th. That the stock of the Warrenton branch of said — was never exempt from taxation (See act 22nd December, 1835).

7th. If the Georgia Railroad and Banking Company ever [fol. 93] had any exemption from taxation that exemption did not embrace the two millions of extra stock authorized by the act of 1847 amending its charter. (See act to incorporate the Savanna's and Albany Railroad and amend Charter of Georgia Railroad passed 25th December 1847) Pamphlet laws of 1847. (See also acts 20th December, 1849, and February 1st, 1850, when the stock above \$1,500,000 was expressly taxed)

8th. That by the act of 20th December, 1849° and 1st February 1850 all the increased stock of said read above \$1,500,000 was expressly subject to taxation by the State, and that without the acceptance of the act of 1849.

9th. That whatever exemption from taxation the Georgia Railroad and Banking Company ever had under her original Charter, and amendments up — the 21st July, 1852, was lost by the Act consolidating the Washington Railroad and Plank Road Company and Georgia Railroad and Banking Company.

Railroad and Banking Company and prescribing a limited rate of taxation upon its capital stock does not include the following property valued as follows, and owned by said road for the years 1875, 1876 and 1877, to-wit:—

For 1875

r or 18/5	
Real Estate / Banking house and lot	420 007 00
Material on hand for road	35,600.06
interest on bonds	19 700 00
Stock, Nashville & Chatt & St I onis De	
Rome Railroad	65,000.00
Rome Railroad Georgia Western R. R.	148,937.00
MACON AND AUDISIA REUROOM CO	
Saltimore and Chas. R. R. Ca and Stoneship	O 000 00
N. Y. and South Carolina Steam Ship	Co. 5,000.00
Donds Macon & Brungwick R. D. C.	
Bonds East Tenn. & Ga. R. R. Co.	12,750.00
Donus Western Rellroad of Alahama	
Bonds Baldwin County	61,100.00
Bonds City of Macon	33,000.00
Bonds Port Royal Railroad Co.	18,000.00
Western Railroad Company of Alabama	
Note of Western Railroad Co of Alaba	236,676.56
Macon & Augusta Railroad Company	na 20,000.00
a Hagasta Rainoad Company	142,016.27
For the Year 1876	-0
Real Estate	\$33,557.30
Banking house and lot	35,000.00
Materials on hand for road	59 063 60
Interest on bonds	39,060.00
	05,0.0.00
[fol. 94] Stocks	
18,000 shares Nashville & Chatt. & St. Louis R.	R. 65,000.00
1) 100 /8 Shales home Kallroad Co	900 000 00
2,000 bonds Macon & Anonsto R R Co	10,000.00
400 bonds N. Y. and S. C. Steamship	20,000.00
	20,000.00
Bonds 15 Macon & Brunswick R.R. Co.	
15 Macon & Brunswick R.R. Co.	#10.750.00
70 Western of Ala Railroad Co	. 412,100.00
5 East Tenn. & Ga. Railroad Co. 10 City of Athens	61,109.00
9 City of Macon 66 Baldwin County	1,000.00
66 Baldwin County Western Railroad of Ala., ½ interest Macon & Augusta Railroad Co	9,000.00
Western Railroad of Ala 1/2 interest	250 100 51
Macon & Augusta Railroad Co.	105 000 10
Port Royal Railroad Co.	
The state of the s	98,417.93

For the Year 1877

Real estate	
Real estate Banking house and lot Materials on hand for road Interest on bonds	\$32,940.60
Materials on hand for and	. 35,000.00
Interest on hands	52,259.11
Interest on bonds	37,520.00
Stocks	
18000 shares Nashville & Chattanooga & St	
Louis R. R. 1,489% shares Rome R. R. Co. 200 shares Macon & Augusto B. I.	dies one ca
1,489% shares Rome R. R. Co	100,000.00
THE PROPERTY OF THE PROPERTY O	40 000 00
400 shares N. Y. and S. C. Steamships	10,000.00
C. Steamships	20,000.00
Bonds	
70 Western Railroad of Ala.	
66 Baldwin County	\$61,100.00
66 Baldwin County 15 Macon and Brunswick R. R. Co.	33,000.00
9 City of Macon Co.	12,750.00
10 City of Athons	9,000.00
9 City of Macon Ga. 10 City of Athens 1 East Tenn. and Ga. R. R.	1,000.00
- Land Lenn, and Ga. N. N.	510.00
Western R. R. of Alabama, purchase account	301,005.81
Coupons paid as Guarantor Macon & Augusta R. R.	
	249,405.54
Western R. R. of Alabama coupon account Port Royal Railroad Co.	83,670.00
Low Royal Railroad Co.	137,472.20

All of which will more fully appear by reference to extracts from the annual reports of said Georgia Railroad and Banking Company read in evidence and for which said amounts said Georgia Railroad and Banking Company is liable to the State for taxation under the acts of the Legislature of 1875, 1876 and 1877.

[fol. 95] 11th. Said Georgia Railroad and Banking Company is liable to taxation to the State from its Banking operations on the following amounts of discounted paper due said company, to wit; for 1875, \$393,605.94; 1876, \$137,234.11; 1877, \$116,103.88.

12th. The stock of the Washington Branch Railroad, after having been consolidated with the Georgia Railroad and Banking Company, is liable to taxation by the State under the acts of 1875, 1876 and 1877.

13th. Said Georgia Railroad and Banking Company is liable to taxation for its undivided one half interest in the Western Railroad of Alabama situated and built within the limits of the State of Georgia.

14th. That said Georgia Railroad and Banking Company have not paid the tax required by law under the acts of 1875, 1876 and 1877 upon the capital stock of \$44,000 upon which they were adjudged liable in 54 Georgia Reports.

Rob't N. Ely, Att'y Gen'l for the State. R. Toombs.

STATE OF GEORGIA

GEORGIA RAILROAD AND BANKING COMPANY

Illegality to Tax Fi. Fas. 1876, 1877, and 1875

It is agreed that all questions of fact, as well as law, involved in said cases be submitted to his Honor, W. L. Grice, Judge Superior Court, Macon Circuit, presiding without the intervention of a jury, with the right to either party to carry the same to the Supreme Court; and that said cases be consolidated and tried together.

July 1, 1878.

J. B. Cumming, McCay & Trippe and Henry Hillyer, Defendant's Attorneys. Rob't N. Ely, Attorney General.

Agreed to: W. L. Grice, Judge Presiding.

It is ordered that the within agreement be entered on the minutes of the Superior Court of Fulton County, nunc pro tune, as of the date July 1st, 1878.

Rich'd H. Clark, Judge C. C. A., Presiding.

[fol. 96]

STATE OF GEORGIA

GEORGIA RAILROAD AND BANKING COMPANY

The above stated case having by consent of counsel been referred to my decision and judgment upon both the law and facts:

It is ordered, considered and adjudged that the demurrer be overruled, that the defendant has a standing in court,

and that the execution was issued illegally, and is proceeding illegally protanto, as indicated hereinafter, and that the affidavit of illegality be sustained to that extent and over-ruled; to the remaining part of it, I hold and decide upon the case now made, that the exemption from taxation given in the original charter continue as held in 54 Georgia Reports, upon all property necessary for the purpose of the incorporation. I further decide that the stock in incorporate companies situate outside of this State and held by the road is not taxable. The proof shows that the road owns real estate and a banking house which is subject to an unpaid tax for the years 1875, 1876 and 1877. Two hundred and ninety one and sixty-six hundredths dollars for each of the years 1875, 1876 and 1877 and from the proof submitted I am unable to determine whether the company owns any other property which is liable to tax and on which the tax has not been paid, and I make no determination on any property except that specified. illegality is therefore sustained as to all of said execution except the said sum of \$291.66 on one of the executions for each of the years 1875, 1876 and 1875 and they are ordered to proceed for this amount and no more, and it is further ordered that this judgment is not to be taken as an adjudication of the right of the State to proceed hereafter to collect any tax that may be due for any of said years in the other property mentioned in said demurrer, owned by the company, except that in the items of real estate and banking house.

July 6, 1878.

W. L. Grice, Presiding Judge.

Clerk's Office, Superior Court of Fulton County Atlanta, Ga., July 23d, 1878.

I hereby certify, That the foregoing pages, hereto attached, contain a true and complete transcript of the record in the case of The State of Georgia, plaintiff in error, vs. Georgia Railroad and Banking Company, defendant in error.

I further certify, That the Spring Term of said Court, at which said case was tried, adjourned Monday July 15th, 1878. All of which appears from the Record and Mmutes of said Court.

Witness my signature and the seal of said court, affixed the day and year first above written.

James D. Collins, Clerk Superior Court,

THE GEORGIA RAILROAD AND BANKING COMPANY By the Court:

- 1. That the limit on the taxing power of the State over the Georgia Railroad and Banking Company, is not expressed or indicated in the title of the act of incorporation, does not render that provision of the charter unconstitutional.
- 2. The limit on the taxing power extends to all the capital of said company, except so much thereof as was issued under the amendment of 1868 authorizing the Clayton branch, 54 Ga., 423. The correct mode of taxing the company's property under existing laws is to estimate all its property at its true value, just as if it belonged to a natural person, and upon so much of this value as equals the amount; of the whole capital stock other than that issued for the Clayton branch, assess at the charter rate, (that is, at such percentage as will yield a revenue to the State equal to one half of one per cent, on the net annual proceeds of all the company's investments); and upon the balance of such value, if any, assess at the general rate. If, however, the charter rate thus arrived at should exceed the general rate, then assess at the latter upon the whole value, as in no case is the general rate, that is, the rate all valorem imposed upon property generally, to be exceeded.
- 3. Affidavit of illegality is not a remedy provided by law for resisting a fi. fa. issued by the Comptroller-General for the taxes of a railroad company, except where the assessment and fi. fa. are based upon a return of property made by the company for the given year. If the Comptroller-General, for the lack of the proper annual returns of the company's property, has proceeded against the company as a defaulter, assessing both tax and penalty, there may be a remedy in Equity by injunction, but the remedy at law provided by the act of 1874 as modified and continued in force by subsequent acts, does not apply.

BLECKLEY, Justice:

1. The title or caption of the act of incorporation was sufficient, for the reasons given in the Rome Railroad case, decided at the present term.

2. It seems to have been the purpose of this court to hold in 54 Ga. 423, that except as to stock issued under the amendment of 1868, authorizing the Clayton branch, the limit put by the charter of the Georgia Railroad & Banking Company upon the taxing power, extends to all the capital stock of the corporation as a railroad company, and is irrepealable. These questions were fairly involved in that case, and the adjudication of them there announced ought to be accepted as final. It does not follow, however, that the court's attention was called to the distinction between [fol. 98] a tax levied directly upon stock, and a tax levied upon the property of the corporation, as to the excess in value of the property over and above the capital stock authorized by the charter and its amendments, and issued accordingly. To a kindred subject the court's attention was called, and upon it a ruling was made, namely; that the reduced rate of the charter would be restricted to the value of the road and its necessary appurtenances, and that any surplus capital kept on hand, or any investment not strictly within the enterprise contemplated in the charter, would be taxable at the general rate. This is taking a look at the property, as distinguished from stock, and the point of view is quite proper; but to arrive at the right mode of taxing the Georgia Railroad and Banking Company under existing laws (the charter provisions included) a further comparison is to be made, the amount of the stock is to be compared with the value of the property. There is a legislative longing to tax railroad property just as other property is taxed, and this is obviously a right direction for the legislative mind to take. Taxation ought to be uniform and impartial. The accident that capital is invested in this or that species of values ought to make no difference, except so far as the State's autonomy is fettered by contract. Though the power of taxation is conceded to be an attribute of sovereignty, it may, in respect to a given property or subject matter, be surrendered or limited by contract. Strange as this doctrine is in itself, and strange as it will probably seem to our posterity, it is, for the present, law in these states, and the courts of this generation must administer it.

The contract with the Georgia Railroad & Banking Company fixes the amount of the capital stock of the corporation, or provides for fixing it, and then stipulates that the stock. shall not be taxed beyond a certain limit. By this the State meant that so many dollars of wealth might be and remain subject to the restricted taxation; it did not mean that what that wealth might produce by way of appreciation of property in which it was invested, or by way of accumulated profit, should also be taxed as capital, and only as capital. The language of the fifteenth section of the original charter is as follows; "The stock of the said company and its. branches, shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads or any of tuem; and after that, shall be subject to a tax not exceeding one half per cent. per annum on the net proceeds of their investments." We have no doubt that "one-half per cent." means one-half of one per cent. The existing laws do not tax stock as such, but they tax property ad valorem, and they seek to tax railroad property with no discrimination for or against it. The stock of the Georgia Railroad & Banking Company, in so far as the corporation, is a railroad company, (not a bank) is subject to a restricted taxation as to all stock authorized and subscribed prior to the adoption of the Code, January 1st, 1863, and this limit in date comprehends all stock except that issued by virtue of the amendment to the charter authorizing the Clayton branch. Now, stock and property ought to off set each other, dollar for dollar, so far as they both extend, pari passa; but as the excess of stock over property would not be taxed by a tax levied exclusively upon property, so a tax [fol. 99] upon the excess of property over stock is not a tax upon the stock. The rule of strict construction should be applied in administering the provision of the charter for restricted taxation. To the extent of the stock at its nominal amount the provision must be respected, but the excess of property over that amount represents appreciation and accumulation, not stock, and is taxable at the general legal rate. In the second head-note, we have indicated with as much accuracy as possible the proper mode of taxing this corporation under existing laws. Though it has banking powers, the corporation is primarily and pre-eminently a railroad company and its property as a bank should be estimated for taxation with its other assets. The banking powers, as now existing seem to depend upon an act passed

in 1870, and are therefore modified by the general provisions of the Code: As a bank, therefore, the corporation is not beyond the unrestricted taxing power of the State. But considered merely as a bank, its capital is non-taxable by reason of the act of 1876, which forbids any assessment whatever from the capital of any bank, and provides for taxing the stockholders on their shares of stock. There is a difficulty in applying this mode of taxation to a railroad company with banking powers, where the stock for banking and the stock for railroad operations are blended and consolidated in ownership, that is, where there is no separation of bank shares from railroad shares. The best solution of the difficulty seems to be to keep sight of the main characteristic of the corporation, and to treat the railroad side, (which in the case of this company predominates in so high a decree), as swallowing up the banking side. It is really the case of a railroad company owning a bank, and not that of a separate banking corporation owning a bank. The bank assets may be treated as a mere investment of the railroad corporation to the extent of their value, and taxable the same as the railroad and its appurtenances, or as other property held in excess of the whole capital stock. It may be worth while to explain, that the reason why we do not think there is a limit of the restricted taxation to stock actually paid in, as we rule there was in the case of the Rome Railroad Company, is owing to there being nothing said in the Georgia Railroad charter on the subject, in the taxation clause, and no reference hade to other legislation which embodies that limitation. In fixing the amount of the Georgia Railroad stock, the amount of stock issued and outstanding is to govern, so that it be not in excess of the amount authorized by the charter and the amendments thereto. And it is to be remembered, also, that amounts authorized since the Code went into effect are not to be counted in any estimate for restricted taxation. This results from the settled rule that restrictions are repealable if they do not antedate the Code; and the railroad tax act of 1874 repeals, whatever of exemption or restriction is repealable. We will not undertake now to determine what particular assets of the Georgia Railroad are taxable, further than we have indicated in the second head note. Let the property of the company be treated, in the first instance, just as if it belonged to a natural person. Then, if the valuation exceeds the capital stock to which restricted taxation applies, let the excess be rated

[fol. 100] as if it belonged to a natural person. This rule is simple and easy, and we suppose there will be no serious difficulty in carrying it but. First administer the charter so far as the restricted rate goes, and then, as to the balance of the property, administer the general tax law.

3. But whether the corporation has been overtaxed or not, the court erred in the disposition made of the case. The affidavit of illegality ought to have been dismissed, for there is no law giving jurisdiction of that remedy, under the facts in the record. Affidavit of illegality is not a remedy provided by law for resisting a fi. fa. issued by the comptroller general for the taxes of a railroad company, except where the assessment and f. fa. are based upon a return of property made by the company for the given year. The statute requires a return to be made for each year; and certainly the legislature has power to exact such a return. Why should not railroad companys make, each year, the returns which the law requires them to make? What has exemption from taxation or restrictions upon the taxing power to do with the duty of making returns? Let the returns prescribed by statute be made, and the State can and will still abide by its obligations in respect to the imposition of taxes. No company can be allowed to absolve itself from the duty of making returns. In the present instance, the Comptroller-General was left to grope in the dark as to the Company's assets. The scheme of the statute is not to leave both law and fact open; but to settle the facts by a return, and then let the company raise the question of law by affidavit of illegality. There is no presumption of law, certainly none in direct opposition to the statistory requisites for a return, that the property remains the same, or of the same value, from year to year, and for every year after the first return is made. If a company wants to avail itself of a statutory remedy, it must comply with the terms laid down in the statute. The general rule is non-intervention by the courts in the collection of taxes. By special statute, railroad companys may resort to an affidavit of illegality, but the same statute requires that they shall make a return and it points out what the return shall contain. The Georgia Railroad and Banking Company did not comply with this statute, and therefore it has no right to prosecute an affidavit of illegality, and the Superior Court of Fulton county has no power to entertain the affidavit. We accordingly reverse

the judgment, with direction that the affidavits of illegality be dismissed for the want of jurisdiction in Fulton Superior court, on the facts apparent in the record. There may be a remedy in equity by injunction, but that question is open, no bill having been filed.

Judgment reversed.

THE STATE OF GEORGIA

US.

THE GEORGIA R. R. & BKG. Co.

This case came before the court upon a transcript of the record from the superior court of Fulton county, and after argument had it is considered and adjudged by the court [fol. 101] that the judgment of the court below be reversed, with direction that the affidavit of illegality be dismissed for the want of jurisdiction in Fulton superior court on the facts apparent in the record.

THE GEORGIA R. R. & BKG. Co.

vs.

THE STATE OF GEORGIA

This case came on before the court upon a transcript of the record from the superior court of Fulton county, and after argument had it is considered and adjudged by the court that the judgment of the court below be reversed, with direction that the affidavit of illegality be dismissed for the want of jurisdiction in Fulton superior court on the facts apparent in the record.

CLERK'S OFFICE,

SUPREME COURT OF GEORGIA, January 8, 1908.

I hereby certify that the foregoing 29 pages contain a true copy of the fi. fa. for taxes of 1875, the illegality filed thereto, the consolidation thereof with two other similar cases, the demurrer to the illegalities, the decision of the trial court, and the decision of the Supreme Court, as the same appear upon the records of this court in the cases of the State of Georgia vs. Georgia Railroad and Banking Company and Georgia Railroad and Banking Company vs. State of Georgia being bill and cross bill, said cases reported in 62 Ga. Rep.

p. 485 et seq. as appears from the records and files of this office.

Witness my signature and the seal of the Supreme Court attached, the day and year first above written.

W. E. Talley, Deputy Clerk, Supreme Court of Georgia. [Seal Supreme Court of Georgia.]

Filed in Clerk's office anuary 10, 1908.

O. C. Fuller, Clerk, By W. C. Carter, Deputy.

Circuit Court of the United States, Northern District of Georgia. In Equity

THE GEORGIA RAILROAD AND BANKING COMPANY

vs.

WM. A. WRIGHT DT AL.

The attached record was considered, though not at the time actually filed, as an exhibit to the bill of complaint of the Georgia Railroad and Banking Company, in support of its contention that the exemption from taxation claimed by complainant was res judicata.

[fol. 102] It is stipulated and agreed that said record be now filed and be transmitted as part of the pleadings in this case to the Supreme Court of the United States.

Jos. B. Cumming, Solicitor for the Georgia Railroad and Banking Company. Jno. C. Hart, Sam'l H. Sibley, Solicitors for Wm. A. Wright. Ligon Johnson, For County of Wilkes & Taliaferro.

Transcript of Record, State of Georgia vs. Ga. R. R. & Bk. Co.

THE STATE OF GEORGIA.

vs,

THE GEORGIA RAILROAD AND BANKING COMPANY.

Illegality Against Tax Fi. Fa. Issued by the Comptroller-General of Georgia.

During the fall term, 1874 of the Superior Court of Fulton County, Georgia said cause came on to be heard before the Honorable Jno. L. Hopkins, Judge of the Superior Courts of the Atlantic Circuit, upon agreement of counsel that said Judge should decide the same "as to law and facts, without a jury, subject to review as in other cases."

Said defendant put in evidence its charter asserted to on the 31st of December, 1833 (See Pamp. Acts 1833 p. 258) the material parts of which in this case, are as follows:

It is "An act to incorporate the Georgia Rairoad Company with powers to construct a rail or turn pike road from the city of Augusta, with branches extending to the towns of Eatonton, Madison, in Morgan County, and Athens, to be carried beyond those places, at the discretion of the said company, to punish those who may wilfrlly injure the same, to confer all corporate powers necessary to effect said object," and to repeal a certain act passed 27th December 1831.

It provided generally for the organization of the company, procuring subscriptions for stock, securing rights of way, election of officers, purchasing and having a holding in fee simple or for years, to them and their successors, any lands, tenements and hereditaments" &c. which they might find necessary, gave them "at all times the exclusive right.of transportation or conveyance of persons, merchandise and produce over said railroad or railroads", while they see fit to exercise the exclusive right provided they charge no more than certain limited rates (§12), gave a remedy against obstructing or injuring said road, and gave them the right to farm out said road to others. The fifteenth section of said act of 1833 was in these words: "Be it enacted by the authority aforesaid, that the exclusive right to make keep up, and use the railroads and transportations authorized by this act shall be for and during the term of thirty-six years, to be computed from the time when said road from Augusta to either of the points herein before designated [fol. 103] shall be completed for transportation; provided that the subscription of stock or shares of said company to the amount of at least five thousand shares, as aforesaid, be filled up within six months from the passing of this act, and the work from or between Augusta and either of the places hereinbefore first mentioned be commenced within two years, and be completed within six fears after the five thousand, shares shall be subscribed. And after said-term of thirty six years shall have elapsed, though the legislature may authorize the construction of other railroads for the trade and .

intercourse contemplated herein; nevertheless the Georgia Railroad Company shall remain and be incorporate, and vested with all the estate, powers and privileges as to their own works herein granted and secured, except the exclusive right to make, keep and use railroads over and through such parts of the country that shall have expired by the foregoing limitations, but the legislature may review and extend the exclusive right upon such terms as may be prescribed by law, and be accepted by said incorporated company. The stock of said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads or any one of them; and after that shall be subject to a tax not exceeding one half per cent. per annum on the net proceeds of their investments."

The twenty-third section repealed said act of 27th of December, 1831, and enacted that "This act of encorporation shall be deemed and taken to be a public act, and shall be judicially taken notice of as such, without special pleading. They further shows that on the 18th December 1835 (Pamp. 1835 p. 180) the General Assembly passed an act amending said charter by changing its name to the Ga. R. R. & Bkg. Company, providing "that the stock of said company shall consist of two million of dollars, one fourth of which append to banking purposes shall be gold and silver coin in shares of one hundred dollars each, of which capital one half may be used for banking purposes" until completion of the road to Athens &c., with privilege then to use more for banking. That the banking privilege should continue twenty five years from the completion of the Union Road, and that the act of which this is an amendment shall "remain in full force and effect in every section and clause thereof except where it conflicts with this act."

And further that on the 25th of December, 1847 (Acts of 1847 p. 192) said company was authorized to increase its capital to four million of dollars; but not to increase the banking capital. And that by further amendment on the 21st of January, 1852 it was allowed to consolidate with the Washington Rail or Plankroad Company. Defendant showed payment of the one half per cent. tax, as averred. Here defendant closed.

The defendant's counsel admitted that said defendant has accepted the amendments passed October 5th. 1868 (Acts

of 1868, p. 147) and 4th of February 1873 (Acts of 1873-p. 37) and Acts of 19th of October, 1870 (Acts of 1870, p. 106-7) and that under and by authority of said act of 1868 said defendant increased its capital stock by selling 440 shares, which were worth on the 1st of April 1874, ninety-three dollars per share. Said amendments were as follows:

[fol. 104] An Act to increase the capital and define the powers of the Georgia Railroad and Banking Company.

Whereas, in the original charter of said Georgia Railroad & Banking Company (then known as the Georgia Railroad Company) it is provided that said company shall have the power to continue the Athens branch towards any point which may be agreed upon on the Tennessee River; and by the amended charter of said company, passed December, 1835, it is provided that the continuation of said road beyond Athens, so as to connect with the Cincinnati Road, shall be steadily prosecuted as soon as the Company shall have satisfactory evidence that the said connection can be formed; and whereas reasonable hopes are now entertained that said Cincinnati Road will be finished to Clayton at no distant day;

Section 1. Be it therefore enacted by the Legislature of the State of Georgia in General Assembly met, That the Georgia Railroad & Banking Company have the right to extend their road from or near the city of Athens to the town of Clayton, in Rabun County, and for that purpose the said company shall have and enjoy all the powers and privileges of the original charter, and amendments.

Section 2. For the purposes stated in the above section, the said company may increase its capital in such form, and upon such terms as the board of directors may determine, provided said increase shall not exceed two million dellars.

Section 3. That said company may lean, on ifterest, any surplus earnings on hand, or which may be deposited by others; provided, not exceeding 7 per cent. interest or discount shall be charged, with the usual rate of exchange on bills drawn on distant points.

Section 4. Repeals conflicting laws.

Approved October 5th, 1868.

An Act to extend, continue and renew the banking privileges of the Georgia Railroad & Banking Company of Georgia.

Section 1. Be it enacted etc. That the banking powers and privileges heretofore granted to the Georgia Railroad & Banking Company of Georgia, by an Act approved December 18, 1835, and the various acts amendatory thereof are hereby continued, renewed and extended for a further term of thirty years.

Section 2. Be it further enacted, That all laws and parts of laws militating against the provisions of this act be, and the

same are hereby repealed.

Approved October 19, 1870.

An Act to amend the charter of the Georgia Railroad & Banking Company as to legalize certain aid extended by it to the Port Royal Railroad Company.

Section 1. The Generall Assembly of the State of Georgia do enact, That from and after the passage of this Act, the action of the stockholders and board of directors of the Georgia Railroad and Banking Company, in aiding the ob[fol. 105] jects of the incorporation of the Port Royal Railroad Company in this state, and in the State of South Carolina, by placing of the indorsement of the former company upon the bonds of the latter company, to the amount of five hundred thousand dollars, upon the terms agreed upon by both companies, be and the same is hereby legalized and recognized as binding upon the said companies, and all parties concerned, with all the terms and conditions of said contract in the same manner and to the same effect as if originally anthorized by law.

Approved February 4, 1873.

Here the evidence closed.

After argument had the court sustained said oath of illegality as to all the tax claimed, except the tax upon said four hundred and forty shares of new stock, and counsel for the State then and there excepted.

And now during said term of said court comes the counsel for the State and tenders this its bill of exceptions, and says that the court erred in holding that said exemption in such charter was not repealed by said tax act of 1874; and that as applied to this case and judgment thereon the tax act of 1874 violated the obligation of the contract between the State and

said defendant; in holding that said exemption was still of force, and constituted a contract which the State could not repeal, and in restricting the fi. fa. as he did by said judgment.

And as the facts aforesaid do not appear of record counsel for the State pray that this, its bill of exceptions, may be certified as required by law, that the errors complained of may be considered and corrected.

N. J. Hammond, Att'y Gen'l; R. Toombs, For State.

STATE OF GEORGIA, Fulton County:

And now comes the Georgia Railroad and Banking Company, by its said attorneys, and on its part excepts to said judgment in so far only as the same requires said tax to be paid on said four hundred and forty shares of new stock, not complainaning of the remaining and other effect of said judgment, and this defendant says the court erred in deciding that the act of the Legislature of Georgia approved February 28, 1874 entitled an act to amend the tax laws of this State so far as the same relate to railroad companies. and to define the liability of such companies to taxation, and to repeal so much of the charters of such companies as may conflict with the provisions of this act, is a valid act, and not in conflict with the constitution of the United States, which declares in the tenth section of the first article thereof that "no State shall pass any law impairing the obligation of contracts," not only so as to protect old strck of said company from such taxation, (which the court did hold), but newpstock also; and second that the court erred in holding that said tax was lawfully assessed on said 440 skares of new stock, and in ordering that said fi. fa. proceed for the collection of the sum of two hundred and four 50/100 dollars, or [fol. 106] for any sum. But this defendant here protests that the question of whether the act of 1835, fixes the amount of defendant's capital employed inchanking was not passed upon by the court. The act of 1835 was not read to the court, and the point was not made in the cause. #And the defendant here excepting, as aforesaid, does so as to the recitals in said bill of exceptions above set forth, with the qualification that when tendered to the judge the same remain sube ject to his approval and certificate.

#And defendant denies that any part of its capital was or is so employed, or that there was any proof of the same. # The more in margin marked # is added before signing. W. H. Hull, Hillyer & Bro., Def'ts Att'y

Note.—In passing upon the case I did not consider the

act of December 17th, 1835. Something was said in the argument about the capital used for banking purposes, but must it was, I do not remember. I can not say, that that act, was, or was not, put in evidence.

John L. Hopkins, Judge.

As modified by the note.

Georgia, Fulton County:

I do certify that the foregoing bill of exceptions is true, and contains all the evidence material to a clear understanding of the errors complained of; and the clerk of the Superior Court of the County of Fulfon is hereby required and ordered to make out a complete copy of the record of said case, and certify the same as such, and cause the same to be transmitted to the January Term 1875 of the Supreme Court, that the errors alleged to have been committed may be considered and corrected.

Signed by me officially this 21st day of December 1874:

Jno. L. Hopkins, Judge Superior Court, Atlanta Circuit.

We hereby consent that the exceptions taken by each party may be heard under this bill of exceptions and in case either party should withdraw its bill of exceptions the other shall stand as to the errors complained of by the party not withdrawing. We not unally acknowledge service and waive copies, and we waive paying costs and superscdeas bonds in like manner, Dec. 21, 1874.

W. H. Hull, Hillyer & Bro., Def'ts Att.; N. J. Hammond, Att'y Gen'l for State.

(Endorsed:) No. — Supreme Court of Georgia, January Term, 1875. The State of Ga. vs. The Ga. R. R. & Bankg. Co. From Fulton County Original Bill of exceptions, Filed in Office, 21st., Dec. 1874. J. D. Collins, C. S. C. N. J. Hammond, Att'y Gen'l R. Toombs. [fol. 107] GEORGIA, Fulton County:

I, Jas. D. Collins, Clerk of Superior Court, in and for said county do certify that within and foregoing is a true, original bill of exceptions, in case of State of Georgia vs. Georgia R. R. & Bkg. Co., as appears of file, and that said court is now in session.

Given under my hand and seal of office this December 23,

1874.

Jas. D. Collins, Clerk. (Seal.)

(Endorsed:) No. 24 Atlanta. Supreme Court of Georgia. January Term, 1875. Atlanta Circuit. McJ. R. June 20, 1875. State of Georgia, Pl'ff in Error, vs. Ga. R. R. & Banking Co. Bill of Exceptions. Filed in office Dec. 24, 1874. Z. D. Harrison.

Comptroller General's Office.

State of Georgia, Fulton County to all and singular the sheriffs and other lawful officers of this State:-

You are hereby commanded that of the goods and chattels, lands, tenements and franchises of the Georgia Railroad & Banking Company, a corporation of this State, you cause to be made the sum of twenty three thousand eight hundred and two 07/100 dollars as its tax for the year 1874 assessed against it upon a return of its taxable property, according to law, and that you pay over said sum of money to the Comptroller-General of said State, at his office in Atlanta, Georgia and return thereto this fi. fa. with your actings and doing-entered thereon.

Witness W. L. Goldsmith, Comptroller-General of said

State under the seal of said office.

Issued this 2d day of October, 1874.

W. L. Goldsmith, Comptroller General of Georgia.

Levied this fi. fa. on the house and lot in the city of Atlanta, known as the depot building and grounds of the Ga. Railroad & Banking Company, surrounding the same, situated on the corner of Alabama and Loyd Streets, containing six acres more or less, as the property of the Georgia Railroa and Banking Company, October 3rd, 1874.

A. M. Perkerson, Sheriff.

Received of Hillyer & Bro. Five 50/100 dollars in full nost in this case to date, Oct. 9th, 1874.

A. M. Perkerson, Sheriff.

STATE OF GEORGIA:

Comptroller-General's Office, Atlanta, Ga., Oct. 6, 1874.

This is to certify that the Georgia Railroad and Banking Company has paid tax on its net income for the year 1874 W. L. Goldsmith, Comptroller-General.

[fol. 108] Comptroller-General Execution for Taxes

THE STATE OF GEORGIA

VS.

THE GEORGIA RAILROAD AND BANKING COMPANY

No. 6 Fi. Fa. Issued Oct. 2, 1874. Principal, \$23,802.07.

The above described fi. fa. levied by the sheriff of Fulton County on the following property of the defendant, the said Georgia Railroad and Banking Company to wit, the house and lot in the city of Atlanta known as the Depot Building and grounds of the Georgia Railroad & Banking Company, surrounding the same, situated on the corner of Alabama and Loyd streets, containing six acres more or less, as the property of the Georgia Railroad & Banking Company. Levy dated Oct. 3rd, 1874, and signed by A. M. Perkerson, sheriff as aforesaid.

And now comes the defendant in said fi. fa. The Georgia Railroad and Banking Company, and says that said fi. fa. levied as above stated is proceeding illegally because it says that the charter of the corporation of this defendant was granted by a public act of the Legislature of Georgia, approved December 21, 1833 by which act in the 13th section thereof it is provided and declared that the stock of said company and its branches shall be subject to a tax not exceeding one half per cent. per annum on the net proceeds of their investments.

And the stock of this defendant was subscribed under said charter, and on faith of its provisions, and the corporators accepted said act of incorporation and organized under the same, and expended the stocj of the company subscribed and paid in by the stockholders in the construction and equipment of said road and branches, and the said provision in said charter has never been repealed or changed by the consent of this defendant. But this de-

fendant has constantly used, enjoyed and exercised the rights, franchises and immunities granted them by their said charter until the passing of the act in this illegality hereinafter complained of and ever since, unless prevented by said act and the proceeding under the same. And the defendant further says that all the property of this defendant on which said tax is assessed on which said fi. fa. is issued is property in which the capital stock of defendant has been invested and constitutes and is the stock of said company and its branches, and the tax so assessed is a tax on said stock, and far exceeds the amount of one half per cent. per annum on the net proceeds of their investments, which last named amount tax year is two thousand six hundred and ninety eight dollars and twenty five cents which this defendant has already paid to the Comptroller-General of the State.

And this defendant further says that there is no valid law of said State under which said tax fi. fa. is issued and that the act of the Legislature approved February 28, 1874 entitled "An Act to amend the tax laws of this State so far as the same relate to railroads companies, and to define the liability of such companies to taxation, and to repeal so much of the charters of such companies respectively as may [fol. 109] conflict with the provisions of this Act" is void and of no effect in so far as it attempts to repeal any portion of flie charter of this defendant, or to impose other and greater tax than one half per cent. per annum of the net profits of this defendant's investments on the stock of this defendant, or the property in which said stock is invested, because said act is in conflict with the constitution of the United States as being an act impairing the obligation of a contract and therefore violation of the first paragraph of the tenth section of the first article of said constitution.

W. H. Hull, Hillyer & Bro., Def'ts Attorneys.

Georgia, Richmond County:

You Jno. P. King President of the Georgia Railroad & Banking Company do swear that the acts stated in the above and foregoing affidavit of illegality are true.

Jno. P. King.

Sworn to and subscribed before me this 20th day of October 1874.

Jno. M. Taliaferro, Notary Public, R. Co., Ga.

STATE OF GEORGIA, Richmond County:

Know all men that the Georgia Railroad & Banking Company as principal and Jno. P. King as security are held and firmly bound unto the Governor of the State of Georgia and his successors in the sum of fifty thousand dollars for the payment of which they bind themselves by these presents.

In witness whereof the said company hath caused these presents to be signed by its president and countersigned by its cashier, and sealed with its corporate seal, and the said security hath set his hand and seal this 20th day of October 1874.

The condition of this obligation is that whereas the Comptroller-General of the State of Georgia hath issued against the said Georgia Railroad & Banking Company an execution for taxes for the year 1874, for the sum of twenty-three thousand eight hundred and two dollars and seven cents alleged to be due from said company, and the same has been levied on property of the said company in the county of Fulton, and said company is about to file its affidavit of illegality to stop the proceeding of said execution.

Now if the said Georgia Railroad & Banking Company shall pay said execution so issued for taxes in case it shall be ultimately adjudged by the courts having jurisdiction of said case that it is liable to pay the same, then this bond to be void, else to remain in full force.

Jno. P. King, P't. Ga. R. R. & Bkg. Co. Jno. P. King, (L. S.)

J. A. Milligan, Cashier. (Seal G. R. R. Co.) Signed and sealed in presence of Geo. P. Butler, Notary Public, R. Co., Ga. 10—268

[fol. 110] · Illegality in Fulton Superior Court

THE STATE OF GEORGIA

VS.

THE GEORGIA RAILROAD & BANKING CO.

It is admitted that the board of directors of the Georgia R. R. & Bkg. Co. by authority of referring to the act of Oct. 5, 1868, found on page 147 of the Acts of that year veted to increase the capital stock by four hundred and forty

shares, and that number of additional shares was sold, the value of which on the 1st of April, 1874 was ninety-three dollars per share. Also that the said board of directors declared their acceptance of the act of February 4, 1873, found on page 97 of the acts of that year. Also that said board, by resolution, declared their acceptance of the act of October 19th, 1870, found on pages 106-7 of the acts of that year, and that the company has done banking business under said last named act. All of which admissions may be used in the case above stated.

W. H. Hull, Att'y for Said Ga. R. R. & Bkg. Co.

We agree that this case be now decided by Hon. Jno. L. Hopkins, Judge of the Superior Court of Fulton County as to law and facts, without a jury, subject to review in other cases.

This 14 Dec. 1874.

N. J. Hammond, Att'y Gen'l. R. Toombs, For State. W. H. Hull. Hillyer & Bro., Att'y for Def't.

After argument had it is ordered and adjudged that the oath of illegality be sustained as to all tax claimed except the tax upon four hundred and forty shares of new stock, valued at ninety-three dollars per share, being the sum of two hundred and four 50/100 dollars, and that the fi fa. proceed to collect said last named sum, and the further sum of — for costs.

This 17th December, 1874.

N. J. Hammond, Att'y Gen'l.

Georgia, Fulton County:

I, Jas. D. Collins, Clerk of Superior Court in and for said County do certify that above and foregoing is a true and complete transcript of the record in case of State of Georgia vs. Geo. R. R. & Bgk. Co., as appears of record, and that said court, is now in session.

Given under my hand and seal of office Dec. 23, 1874.

Jas. D. Collins, Clerk Superior Court. (Seal.)

[fol. 111] (Endorsed:) No. 24 Atlanta. Supreme Court of Georgia. January Term, 1875. Atlanta Circuit. State of Georgia, Pl'ff in Error, vs. Georgia R. R. & Banking Co. Copy of record. Filed in office December 24, 1874. Z. D. Harrison. N. J. Hammond. R. Toombs.

Supreme Court of Georgia, January Term, 1875

STATE OF GEORGIA, Plaintiff in Error

VS

THE GEORGIA RAILROAD & BKG. Co., Def't in Error.

By the Count:

1. By the original charter of the Georgia Railroad and Banking Company, it was, in terms, provided that "the stock of said Company and its franchises, shall be exempt from taxation for seven years from the completion of said railroads, or any one of them, and after that shall be subject to a tax of not exceeding one half of one per cent. per annum on the net proceeds of their investments."

Held: That under the settled rules of construction it was competent for the Legislature to grant this exemption, and forming as it does, a portion of the contract of incorporation, any repeal of it by the Legislature, without the consent of the corporation, is in violation of Art. 1, Section 10, par. 1 of the Constitution of the United States, prohibiting any State from passing any law impairing the obligation of contracts.

2. None of the Acts of the Legislature of this State which have been accepted by the Georgia Railroad and Banking Company rassed since the adoption of the Code, have brought said charter, so far as its investment in said road and its necessary incidents are concerned, within section 1636 of said Code of 1863.

3. The tax act of 1874 taxing the railroads of this State upon the property belonging to them, as other property of the citizens of this State is taxed, is, so far as the Georgia Railroad Company is concerned as to its railroad and appurtenances, unconstitutional and void.

4. Bonds and other property of said company not forming any part of said reilroad or its appurtenances, are subject to taxation as the appurent of the said reilroad or its appurtenances.

ject to taxation as the property of other citizens.

McCay, Judge, delivering the opinion:

Were this a new question I should not hesitate to hold that it was not competent for the General Assembly of this State to enter into any contract with the corporators of the Georgia Railroad and Banking Company to exempt the

corporation, permanently, from taxation, nor to fix a limit, beyond which the corporation should not be taxed. It a principle deducible from the nature of Legislative bodies, · that one Legislature cannot fix a limit to the Legislative power of another and subsequent Legislature. This only the people, in their sovereign capacity can do. This is the [fol. 112] object and function of the Constitution alone. If a new Legislative body can do this in one particular why may it not do so in another? If by a contract a Legislature may impose limits upon the power of a subsequent Legislature to tax, why may it not by contract, limit also its power to establish courts, regulate the mode of making private contracts, the making of wills; the descent of property, or any other of the Legislative duties, east by the Constitution upon this branch of the government, established to conduct the affairs of the State? The taxing power is especially a duty, which from the nature and necessity of it, it is of the utmost importance, shall remain to each Legislature intact, as the people have in their sovereign capacity seen fit to restrict it.

This power is the very life of the State, a necessity for its very existence, since it can never be known what the future may have in store, and if by a contract, a Legislature may stipulate that one man, or one corporation shall enjoy either an entire, or partial exemption from this necessary burden, where is the hindrance to the power of one Legislature to grant, by contract, this exemption to a set of men, to the landowners, the railroad proprietors, or indeed to any extent either of persons or property.

In the early history of this country, before the subject was fully understood, and especially before the Dartmouth College case, our Legislatures moulded as they were, upon the pattern of the parliament of Great Britain, were not so careful to scan the Legislation they adopted, knowing that if evil consequences to the State should ensue, it was competent for a subsequent Legislature to undo the knot, by

which the State was bound.

But under the disability the decision in the Dartmouth College case, puts upon the Legislative power, it now often happens that in a thoughtless hour the State, with but a nominal consideration is shorn of its most important perogatives.

It becomes, therefore, of the greatest importance to inquire if there be no limit to this capacity of one Legislature

to bind another. Is the whole power of the people, the vital existence of the State, its whole Legislative capacity, capable of being thus hampered, bartered away, sold to a corporation! Where is the limit! Or is there none! Can it be that under that clause of the Constitution of the United States, which forbids a State from passing any law impairing the obligation of a contract, a State Legislature has a power which enables it to put a final conclusive limit

to the Legislative power of its successors?

that the decisions of the Supreme Court of the United States upon it, which it is admitted are definite and decided, are not sustainable upon principle, and not in harmony with other well settled adjudications, involving a view different from that taken by that high tribunal. The Supreme Court of this State in Hambrick v. Rowe, 17th Ga. 56, held in solemn argument, that it was not competent for one Legislature to bind another, not to authorize the removal of a county seat, and in Daly v. Harris, 33rd Ga. (Supplement) no less a jurist and moralist than Judge Jenkins, says: governments are mere agencies, established [fol. 113] for the security of rights, and the promotion of interest appertaining to the founders, who by common consent have become the governed.

To this end they have been invested with certain necessary powers, the exercise of which devolves upon different individuals, which the course of time come successively in

the government.

If the depository of these powers for the passing hour may alien any one of them so as to deny itself and its successor the exercise of it, all of the others may be so aliened, and the result would follow that the agency established, for specified ends, may in the discretion defeat those ends. And in Ohio Life I. & T. Co. vs. Debalk, Judge Taney, says:

body of a State are undoubtedly committed to them as a trust to be exercised to the best of their judgment, for the public good, and no one Legislature can by its own act disown its successors of any of the powers or rights of sovereignty, confided by the people to the Legislative body unless they be authorized to do so under the Constitution, under which they were elected. They cannot therefore, by contract deprive a future Legislature of the power of imposing any tax it may deem necessary for the public good.

And in every question of this character, the question must depend upon the constitution of the State, and the extent of the power therein granted to the Legislative body."

And Mr. Justice Catron and Campbell seem by their

opinions to concur in this idea.

It must bowever be admitted that notwithstanding their view; as well as, in spite of the decisions of some of the most respectable Courts and Judges, of the State Courts, the Supreme Court of the United States, has with tolerable uniformity, laid down and adhered to the doctrine that such an exemption is within the ordinary Legislative discretion, that it may assume the shape of a contract, and when this is the ease that it is irrepealable unless expressly stipulated to the contrary. 7 Cranch 164. 3 Hen. 133. 16 Hen. 389.

As the Supreme Court of the United States is a Court of appeal from this court, on a question of this character, I feel bound to conform myself to its decision, and although I feel it to be my duty to what I deem the truth, to express my dissent from the conclusions at which it has arrived.

On the authority of these decisions we therefore decide that it is competent for the General Assembly to contract in the charter of a corporation that it shall be exempted from taxation, or as in the charter of the Georgia Railroad Company, that its tax shall not exceed ½ of one per cent. on its earnings, and that having so contracted, without reservation, it is not competent for a subsequent Legislature to violate the obligation of that contract by assessing a higher tax.

Now has there been any Legislation accepted by the company since the adoption of the Code, which puts this corporation on a footing with the Central or Southwestern Roads, so as that the tenure by which it holds its franchises and exemption is a charter granted since the Code, and [fol. 114] therefore capable of being withdrawn. Indeed with the exception of the Tax Act complained of, there has been since 1863, no legislation looking to any general oper-

ation on the charter.

The renewal of the Bank charter is doubtless within the provision of the Code making charters granted since its adoption repealable. But there is nothing in the Record showing that any portion of the capital is now employed in Banking, indeed directly the contrary is stated. The banking seems to be solely on the credit of the company.

There seems to be no doubt that the stock issued under the amendment granted to authorize the Clayton branch is within the clause. Such was the ruling of Judge Hopkins and we think he was right.

As to the surplus on hand, or any investments not strictly within the enterprise contemplated in the charter, we are clear that this is taxable. The company is only exempted on the value of its road, and its necessary appurtenances, and those appurtenances must be the ordinary and usual appurtenances of such an enterprise. Anything in the nature of an investment not within this scope is not exempt. We would not inquire closely into the status of affairs on any particular day, as it may well be that it may have a surplus on hand for a special purpose. But even as a fund to meet contingencies we think a permanent surplus is not covered by the exemption in the charter.

Judgment affirmed.

Supreme Court of Georgia.

Thursday, June 17, 1875.

The Honorable Supreme Court met pursuant to adjournment.

Present, their Honors, Hiram Warner, Chief Justice and H. K. McCay and R. P. Trippe, Judges.

The following judgment was rendered:

THE STATE OF GEORGIA

YS.

THE GA. R. R. & BRA. Co.

This case came before the court upon a transcript of the record from the Superior court of Fulton County, and after argument had, it is considered and adjudged by the court that the judgment of the court below be affirmed.

Clerk's Office, Supreme Court of Georgia, Atlanta, Ga., July 2, 1907.

I hereby certify that the foregoing pages hereto attached contain true copies of the original Bill of Exceptions, Transcript of Record, Opinion and Judgment of the Supreme Court of Georgia in the case of The State of Georgia, plaintiff in error, vs. The Georgia R. R. & Banking Co., defend-[fol. 115] ant in error. Said case being reported in the 54 Ga. R. p. 423, as appears from the records and files of this office.

Witness my signature and the seal of said Supreme Court hereto affixed the day and year first above written.

Z. D. Harrison, Clerk. (Seal Supreme Court of the State of Georgia.) Filed in Clerk's Office Jan'y 10, 1908. O. C. Fuller, Clerk, By W. C. Carter, Deputy.

Clerk's Certificate

UNITED STATES OF AMERICA, Fifth Judicial Circuit, Northern District of Georgia:

I, O. C. Fuller, Clerk of the Circuit Court of the United States for the Northern District of Georgia, do hereby certify that the above and foregoing is a true, full, correct and complete transcript of the record, assignments of error, bond and all proceedings had in cause No. 1192, wherein the Georgia Railroad and Banking Company is complainant and William A. Wright is defendant, except that the original Citation is included herein instead of a copy thereof, as fully as the same remain of record and on file in the clerk's office of the said Circuit Court.

In testimony whereof I hereunto set my hand and the seal of the said court, at Atlanta, Georgia, this the 28th day of January, A. D. 1908.

O. C. Fuller, Clerk. (Seal U. S. Circuit Court, N. D. Georgia.)

Endorsed on cover: File No. 21,006. N. Georgia C. C. U. S. Term No. 268. William A. Wright, Comptroller General of the State of Georgia, The Churty of Wilkes, and The County of Taliaferro, appellants, vs. Georgia Railroad & Banking Company. Filed February 6th, 1908. File No. 21,006.

[fol. 116] UNITED STATES OF AMERICA, SS:

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Honorable the Judges of the Circuit Court of the United States for the Northern District of Georgia

GREETING:

Whereas, lately in the Circut Court of the United States for the Northern District of Georgia before you or some of you, in a cause between The Georgia Railroad and Banking Company, complainant, and William A. Wright, Comptroller General of the State of Georgia, The County of Wilkes and the County of Taliaferro, defendants, wherein the decree of the taid Circuit Court, entered in said cause on the third day of July, A. D. 1907, is in the following words, viz:

"This cause coming on to be heard upon the bill of complaint of the Georgia Railroad & Banking Company vs. William A. Wright, Comptroller General, and amendments thereto and the exhibits to the same, and the answer and amendment thereof interposed thereto by the defendant, William A. Wright, Comptroller General, and upon the answer of the defendant Wilkes County, and upon the answer of the defendant Taliaferro County, it is

Considered, ordered and adjudged by the court that the Charter of the complainant, to wit; the Act of the Legislature of Georgia of December 21st, 1833, and various other Acts of said Legislature, passed prior to the 1st day of January, 1863, is a valid and binding contract between the State of Georgia, and complainant the Georgia Railroad & Banking Company;

That the said Charter covers complainant's main rail-road between the cities of Augusta and Atlanta, in said State one hundred and seventy-one miles; its branen rail-road between Barnett and the City of Washington, in said State, eighteen miles; and its branch railroad between Union Point and the City of Athens, said State, forty miles; and all of the apportenances of said railroad including their rolling stock; also complainant's franchise to be a corporation and other franchises without reference to the valuation of all of said property, which valuation it is admitted exceeds by four millions of dollars the nominal value of the

capital stock of said Company, said excess being produced by natural increase in the value of said property and by renewals, alterations and betterments of the same from time to time by the complainant. The said Charter provides a system of taxation for said property exclusive of all other taxation, to wit;—one half of one per cent. of the net earnings of said property.

That all property of complainant other than that above specified including so much of said property as is represented by four hundred and forty shares of stock subscribed under the Act of Oct. 5, 1868, is liable to taxation

under the general laws of the State of Georgia.

[fol. 117] It is further ordered, adjudged and decreed that defendant be perpetually enjoined from levying and collecting any taxes, State, county or municipal from said complainant not in accordance with this decree.

This the 3rd day of July, 1907.

Wm. T. Newman, U. S. Judge."

as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress, in such case made and provided, fully and at large appears.

[fol. 118] And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and nine, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued

by counsel:

On consideration, It is now here ordered, adjudged, and decreed by this Court that the decree of the said Circuit Court in this cause be, and the same is hereby, modified so as to exclude the eighteen miles constituting the Washington Branch Railroad, but in all other respects be, and the same is hereby, affirmed, the costs of this appeal to be divided between Wright, Comptroller General, and The Georgia Railroad & Banking Company.

February 21, 1910.

[fol. 119] You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and decree of this Court as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 8th day of April in the year of our Lord one thousand nine hundred and ten.

James H. McKenney, Clark of the Supreme Court of the United States.

File No. 21,006. Supreme Court of the United States, No. 70, October Term, 1909. William A. Wright, Comptroller General, etc. vs. Georgia Railroad and Banking Company. Mandate. U. S. Circuit Court. Filed in Clerks Office, May 23, 1910. O. C. Fuller, Clerk.

[fol. 120-121]. WILLIAM A. WRIGHT, COMPTROLLER GENERAL OF THE STATE OF GEORGIA,

VS.

GEORGIA RAILROAD & BANKING COMPANY.

No. 1192 IN EQUITY

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

March Term 1910

An appeal in this case having been taken by complainant from the decree of this Court entered on the Third day of July, Anno Domini 1907 to the Supreme Court of the United States, and the said Supreme Court of the United States having on February 21st, Anno Domini 1910 issued its mandate affirming the said decree except as therein modified:

It is now ordered that said mandate of the Supreme Court of the United States be entered and that the same be bereby made the judgment of this Court.

o In open Court, this May 23, 1910.

(Signed) Wm. T. ____, U. S. Judge.



Altorney Denerals Office

STATE DE TEURTHA.

Manta !in

The State of Georgia Sellyality against tax fife fours by the She Georgia Rail Road Complotedly General and Muniking Company of Georgia.

During the fall him 1874 of the Dufferier Court of Hullow County Burgin Say Cause Came guts be heard before the Hounable pro I Northing Juste of an Infrier Courts of the Uttanta Circuit ropen agricums of Connect that earl ful should dead the Same as to law That, methout a fung Subject tonviser as in other Caus' Days defendant fout in Evidence de Charten assented to on the 31- of December 1833 (Ser pamp der, 1833 1 258) the Materi al parts of which on this case anas It is an all to man ponate the Blogen Rail that Company, man powers to Construct about a learnfulle stone from the City of Chequesta, mith branches extending to the hours of Calouin, marison in Huyan County and athers, to be canned by mother

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places, at the disention of said Company to fewish than who way mefully enfur the Same, to Confer all Conferate fours necessary to effect said object and to Refer a cortain and fapor 27 bear It provided generally for the organ Zation of the Company, procuring Sistempleous for stress, Sicuring funchacing and having a holding in their enecessors, any lands, terrements I himditurents to which they might find mecifony, gave them at all times the exclusion right of transportation or auryance ofpersone, muchanize aut produce, our part rail sout or rail roads, " While they See fut to Exercise the Exclusion right formord this charge no men than contain limited rates (5/2), gave arrivedy against obathristing or infurry Dard toad & gove there the pife to farm and Raide road to other the fifteenthe section ofsaid ach of 1833 Wes in these words. Phil aunted by the authority aforeard, That the Craberin right to make, Kufo rip, and un the raisonads and bransportations duttories by the act ...

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The defendants Comment admitted that said refundants had accepted the accomments paper actober 5 12 1868 acts of 1868 for 147) and 4th of February 1873 (act of 1873 pg 971 and harof 19 1 of achiber 1870 (act 1870 \$ 106-7) and that under the authors of each. act of 1868 sais defendant incres and fort share which men morte onther firelof april 1874 minety-Uni dolean for Share. Said amindreul mm as follows: An Act to increase the capital & define the sowers of the Georgia Rail Road & Bank. Thereas, In the original char ter of said yearha Kail Boas & Hanking Company, thenkenown as the Georgia Rail Road Com Jany, it is provided that Said Company shall have the fower to continue the actions brand towards any point which may be agreed report on the Jenne frey River, by the amended Charter? of said Company, paped in Escent ber 1835, it is provided that the cow

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hundren of Said road, bigen's Meling. so as to connect with the timent nati Rood, Shall be dlearily peroscented so Brow as the Com fearing so shall have Satisfactory evidence that the said connection com be gorners the herens to covered ble tropes are now enterdamed that saidenciniali Non i rville he finishedo Clayten at no distant clay; 1. Be it blure fore cina stor by the Legislature of the state of Gerria in you eral de format, I that the georgia Hail Read San Dong Com Dany leave the right to colone their roun from or wire the City of cithens lothe lower of Colonglow, in Ho bin County. I for that purpose the some company whall line of surjey all the powers is privileges of alle or fine for harter A amoliminals. Gre. II. Van the pur production the above. Beating the Back come bandy may inches ils empilal instruction francisco spirale terms, and the book of the col erry many dette services; promoder Barries Brende Shall o soger ter million del soull. I'm tomer company quay trace on This is poor copy, but is the best obtainable

interest, any surplus earnings on hand, in which may be deposited by others: provided, not exceeding seven per cent. interest or discount shall be charged with the remal rate of exchange on bills drawn on distant points. fee IV. Repeals conflicting laws. An Act to extend, continue Frenew the banking privileges of the Georgia Rail Road & Banking Company of Georpa. Gestion I Be it enacted, se, That the banking powers spriveleges heretofore granted to the Georgia Rail Hoad & Banking Company of Georgia, by an act approved December 18, 1835, the various acts amendatory thereof, are hereby continues, renewed Festended for a further term of thirty rears. Jec. 2 For it further enacted, That all lows sparts of laws mulitating against the processions of this del be, the same are therebyre. pealed Approved October 19,1870



DIRCLE DE TEPRTEIA.

Allunta Lin

An & Act to amend the Charter Company as to legalize certain aid extended by it to the Port Royal Railre a o Empany. Section I The General Assembly of the State of Georgia de enact, That from & after the passage of this Act, the action of the stockholders + board of directors of the goor. ya Railions & Banking Company, in arding the objects of the incorporation of the Fort Royal Railroad Company, in this State, I'm the state of South Carolina, by placing of the indorsement of the former Company reporthe bounds of the latter company, to the amount of five luner & dellows and Dollars, a gen the termsagreed upon by both aintanies, be & the voume is hereby legalized & reasonized as building reston the said companies rall parties conserned, with all

the terms of conditions of some contract in the same manner To lo lice same effect as if originally authorized by Approved Tebruary Ath, 1873. Iten the Evidence Cloud after agreement had the Court succe tained Said out of illigality as to all the tax claimed except the laxupor Law form hundred another Shans of Www Stack and Council for the State thin wir then cranted Und wir Bairing Raid lever of Said Carrel Comes the Connect for the State and tenders they of hills of Exceptione and Suigethat the Court Erred in holding that Said Excuption in South Char ter was not repealed by said tax adof1874; and that arappens; lotter care and proprient themen the lax actof 1874 violated the obligation of the Contract belining the State windfaed defendants lour lituted a control which the State and not reflect and in netricting the fife us he did by Rusel fred presents

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See of Leongia , and non come Mi Leungia Mailroad & Chambing Fullin County's tempany by it said allernys and on it part except to said fudgement in so far oney as the some Auguer said lay to be paid on said four hundue and forly shares of new book, not complaining of the personing & other Effect of said fragment F This defendant easy the court exact in deciding that the act of the regulature of Georgia afferred February 28 4/874 Entitled an act to amend the lax laws of This Stale to far as the same relate to received cornparis and to afine the hability of such companis to laration, and to depeal to much of the charling of euch companies as may coupled with the twoverious of this art, in a valid art and not in conflict with the constitution of the Muster Clases which dielains in the leath diction of the fine witich thereof that no black that any law impairing the obligation of entires," not only to as to furtist old Block of Raid Company fines. 336

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[fol. 149] IN UNITED STATES DISTRICT COURT.

Answer of Defendant on Request for Admission Under Rule 36—Filed April 2, 1949

Defendant, Charles D. Redwine, State Revenue Commissioner, in response to the request for admission of certain documents and matters, answers as follows:

1

Defendant admits the authenticity of the copy of the record in the case of William A. Wright, Comptroller General of Georgia, v. Georgia Railroad and Banking Company, referred to as "Exhibit A" in the request for admission.

2

Defendant admits the authenticity of Exhibit B as being a true copy of the record in the Supreme Court of Georgia in the case of State of Georgia v. Georgia Railroad and Banking Company, 54 Ga. 423.

3

Defendant admits the allegations contained in Paragraph 3 of the request for admission.

Eugene Cook, Attorney General; Claude Shaw, Deputy Assistant Attorney General.

Note: Certificate of Service Omitted.

[fol. 150] IN UNITED STATES DISTRICT COURT

MOTIONS OF PLAINTIFF FOR JUDGMENT ETC.—Filed April 5,

Plaintiff moves the Court:

1

To enter a judgment on the pleadings in favor of plaintiff permanently enjoining defendant from levying or collecting any ad valorem tax on the charter tax lines of plaintiff as described in the complaint, except as permitted in the prior decree of this Court as modified and affirmed by the Supreme Court of the United States, set out in paragraph 17 of the complaint.

To enter a summary judgment in favor of plaintiff permanently enjoining defendant from levying or collecting any ad valorem tax on the charter tax lines of plaintiff as described in the complaint, except as permitted in the prior decree of this Court as modified and affirmed by the Supreme Court of the United States, set out in paragraph 17 of the complaint.

3

If the motion for judgment on the pleadings and for summary judgment be not grafited, then to enter an interlocutory injunction temporarily enjoining defendant from levying or collecting any ad valorem tax on the charter tax lines of plaintiff as described in the complaint, except as permitted in the prior decree of this Court as modified and affirmed by the Supreme Court of the United States, set out in paragraph 17 of the complaint.

4

If the motion for judgment on the pleadings or for summary judgment be not granted, then to strike the 23rd defense insofar as the same denies paragraph 26 of the complaint, or in the alternative to require a more particular [fol. 151] statement of the denial of paragraph 26 as required by Rule 9(c) of the Rules of Civil Procedure.

Plaintiff submits in support of these motions:

- (a) The complete record in the case of Georgia Railroad & Banking Company v. William A. Wright, No. 1192 in Equity in this Honorable Court, and the record in said case on appeal to the Supreme Court of the United States, and the complete record in the case of State of Georgia v. Georgia Railroad & Banking Company, 54 Ga. 423; said records being adopted by reference both in the complaint of plaintiff and in the answer of defendant. Copies of said records will be presented at the hearing on this motion;
 - (b) Affidavit of Hal D. Beman;
 - (c) Affidavit of Hughes Spalding;
 - (d) The verified complaint;

(e) Request for Admission under Rule 36, filed March 25, 1949.

Spalding, Sibley, Troutman & Kelley; Robert B. Troutman, Furman Smith, Attorneys for Plaintiff, 434 Trust Company of Georgia Bldg., Atlanta, Georgia.

Note: Notice and Certificate of Service Omitted.

[fol. 152] IN UNITED STATES DISSRICT COURT

AFFIDAVIT OF HAL D. BEMAN-Filed April 5, 1949

Before the undersigned, an officer authorized to administer oaths, personally appeared Hal D. Beman; who, being sworn, deposes and says on oath as follows:

1

I am Vice-President of the Georgia Railroad & Banking Company. As such I have custody of the minute books and records of the Georgia Railroad & Banking Company. I have been employed by the Georgia Railroad & Banking Company since 1918.

The Georgia Railroad & Banking Company, between 1834 and 1845, built a railroad from Augusta, Georgia, to Atlanta, Georgia, a distance of approximately 171 miles, and a branch from Union Point to Athens, Georgia, a distance of approximately 39 miles. Said railroads were built by the Georgia Railroad & Banking Company either by its own forces or by contractors working under its supervision.

3

The facts stated in paragraph 2 above have always been general knowledge among the officers of the Georgia Railroad & Banking Company and are shown by the books and records of the Georgia Railroad & Banking Company in my custody as an officer of the corporation.

The Georgia Railroad & Banking Company has never paid any ad valorem taxes to the State of Georgia or any of its subdivisions on the line from Augusta to Atlanta or the branch from Union Point to Athens, except as provided in Sec. 15 of its original charter approved December 21, 1833. Between 1910, when the case of Georgia Railroad & Banking Company v. Wright, Comptroller General, in the United [fol. 153] States Court was finally decided, up until 1945, neither the State of Georgia nor any of its officials made any effort to collect any tax against said lines or any claim that such lines were subject to tax except as provided in Sec. 15 of the charter.

5

Attached hereto as Exhibit A is a true copy of an extract from the accounting report of the Interstate Commerce Commission on the Georgia Railroad & Banking Company, filed with the Georgia Railroad Company and forming part of its permanent records in my custody.

6

Attached as Exhibit B is a true copy of an extract from the decision of the Interstate Commerce Commission on the valuation of the Georgia Railroad & Banking Company, officially reported in 125 I.C.C. 551, and forming a part of the permanent records of the Georgia Railroad & Banking Company in my custody.

7

Attached as Exhibit C is a true copy of extracts from the minutes of the meetings of the stockholders and directors of Georgia Railroad & Banking Company in my custody as an officer of said corporation.

This affidavit is made to be used in evidence on the mo-

tions of plaintiff in the above stated case.

Hal D. Beman.

Sworn to and subscribed before me this the 1st day of April, 1949.

Beatrice W. Lee, Notary Public, Richmond County, Georgia, My Commission Expires Sept. 23, 1952. [Notarial Seal.] [fol. 154]

EXHIBIT "A" TO AFFIDAVIT

Extract from Accounting Report of Interstate Commerce Commission on Georgia Railroad & Banking Company

The Georgia acquired its mileage in the following described manner:

Acquired by	Approximate Mueage	
Construction:		
Augusta to Atlanta (main lin	ne). 171	
Camak to Warrenton (branch	h line) \ 4	
Union Point to Athens (branc		214
	· · · · · · · · · · · · · · · · · · ·	
Merger:		
Barnett to Washington (bran	ich line)	17
Purchase at Foreclosure Sale:		
Warrenton to Macon (extens	ion of branch	
line)	74	
Less M. & A. Junction (near	Mogul) to	10
Macon (abandoned after p		. \$70
Micros Control		
		AL PARTICIPATION AND PROPERTY AND ADMINISTRATION AN

Total approximate mileage

301

Acquired by Construction:

The Georgia constructed about 214 miles of its line of railway. The construction work was performed, either by the Georgia's own forces, or by contractors working under its supervision. The first surveys were commenced in November, 1834; the first actual construction work was begun in June, 1835; and the first mileage, from Augusta to a point about eleven miles west of that place, was epened for operation in May, 1837. The line was extended to Atlanta in sections, the last being completed in September, 1845. The branch line between Camak and Warrenton was opened for operation in January, 1838, and that between Union Point and Athens in December, 1841.

Filed April 5, 1949.

[fol. 155]

EXHIBIT "B" TO AFFIDAVIT

Extract from Valuation Report of Interstate Commerce Commission on Georgia Railroad & Banking Company, Reported in 125 I. C. C. 551, 592

The property owned by the Georgia on date of valuation was acquired as follows:

Approximate

Mileage

By construction:	
Augusta to Atlanta (main line)	171
Camak to Warrenton (branch line).	,, 4
Union Point to Athens (branch line)	1 39
Total constructed	214
By merger, Barnett to Washington (brane	ch line) 17
By purchase at foreclosure sale, Warre	nton to
Macon (extension to branch line), 7	4 miles,
less M & A Junction (near Mogul) to	Macon
(abandoned after purchase), 4 miles	70
Total	301

Acquired by Construction.—The Georgia constructed about 214 miles of its line of railway. The construction work was performed either by the Georgia's own forces or by contractors working under its supervision. The first surveys were commenced in November, 1834, the first actual construction work was begun in June, 1835, and the first mileage, from Augusta to a point about 14 miles west of that place, was opened for operation in May, 1837. The line was extended to Atlanta in sections, the last being completed in September, 1845. The branch line between Camak and Warrenton was opened for operation in January, 1838, and that between Union Point and Athens in December, 1841.

Copied from Book No. 3, Pages 75 and 76, Minutes of Meetings of Directors, The Georgia Railroad & Banking Co., from May 18, 1841 to May 10, 1871

A regular meeting of the Board was held on Tuesday the 10' November 1846, at which the following members attended, viz Mr. King President and Messrs Conyers, Saffold, Jones, Warren, Davis, Bowdre, Dougherty, Cunningham, Phinizy, Bones, Miller, D'Antignac & Stovall, Directors.

The minutes of the 14' July, 17 July, 31 July & 27' August 1846 & the State of the Bank for today were read &

approved.

The President submitted to the Board the following communication from J. Edgar Thomson:

"Chattanooga, July 22, 1846.

DEAR SIR: "

A severe cold, accompanied by considerable fever, prevented me while at Atlanta from writing to you as I had intended on the subject of our last conversation.

The kindness that has always been extended to me by the Stockholders of the Georgia Rail Road would prevent me from making any move that I think would be prejudicial to their interest.

The Road is now done, and it would seem that I might be relieved from its future superintendence. But as many of the Stockholders have expressed to be a strong desire, that I should still remain in the employment of the Company, I have upon reflection concluded to propose the following organization for conducting the business of the Road, which if adopted by the Direction will enable me to participate in its management, and attend, also, to some other engagements, which I feel under obligations to look after.

I propose, that Mr. Arms shall fill the office of General Superintendent of Transportation and auditor of accounts. [fol: 157] In the first capacity he will be charged with conducting the transportation on the Road and have direction of the Repair Shops at Augusta & Atlanta: and in the second, it will be his duty to audit all accounts with the several agencies of Transportation Department, and see that the amounts due to the Company are paid over to F. Midlams

Receiving Agent. Also, to examine and approve all debts due for Transportation, Motive Power, and Maintenance of Cars. Mr. Arms to be assisted in conducting transportation by Mr. Hight to whom the running of the Freight Trains will be committed in addition to his present duties.

The other officers to remain as heretofore except that Mr. Armstrong gives place to Mr. Beers as Bookkeeper.

The position that I propose to occupy is a general charge of the Repairs & Renewal of the Road and the machinery upon it, as heretofore, assist in the arrangement of Freights on the Road, and make to the Board at any time such recommendations as the operations of the Road may require to be carried out, or seem of importance to the interest of the Company. For the performance of these duties I shall not ask more than \$2000 per annum.

Garnett adheres to the classification of Freights on his.

road &c. &c.

Hon. J. P. King, President &c.

Yours truly, J. Edgar Thomson."

[fol. 158] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF HUGHES SPALDING-Filed April 5, 1949

Before the undersigned, an officer authorized to administer oaths, personally appeared Hughes Spalding, who, being sworn, deposes and says on oath as follows:

I am a partner of the firm of Spalding, Sibley, Troutman

& Kelley.

On February 8, 1949, I had a conference with Charles D. Redwine, State Revenue Commissioner of the State of Georgia. My partner, William K. Meadow, was present. At that time I told Mr. Redwine that my firm had been employed to represent the Georgia Railroad & Banking Company in its litigation with the State of Georgia overtaxes and that we were going to take over the pending litigation from now on. He replied that he did not know that. We talked briefly about the issues in the litigation. I asked him if he was going to proceed in an effort to collect the taxes claimed to be due when the remittitur in the present case came down to the Georgia courts. He said that he was and that when the matter was brought up to him he would issue an assessment to collect the taxes.

This affidavit is made to be used in evidence on the motions of plaintiff in the above stated case.

Hughes Spalding,

Sworn to and subscribed before me this the 4th day of April, 1949. Eugenia H. Brook, Notary Public, DeKalb County, Georgia. My Commission Expires Sept. 23, 1951. (Notarial Seal.)

[fol. 159] IN UNITED STATES DISTRICT COURT

REQUEST FOR ADMISSION

Under Rule 36

Filed April 12, 1949

Defendant, Charles D. Redwine, State Revenue Commissioner, pursuant to Rule 36 of the Rules of Civil Procedure requests plaintiff, Georgia Railroad and Banking Company within ten days after the service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

J

That the branch of plaintiff's railroad to be run from the Union Road to Eatonton, Georgia as provided for in the Act of 1833 creating the corporation, Georgia Railroad Company, has never been built.

2

That under the Act of 1833, it was provided that the Georgia Railroad Company should continue the Athens branch towards the point on the Tennessee River, and in pursuance of same, the said Georgia Railroad Company surveyed a line running from Athens, Georgia towards the Tennessee River near Decatur, Alabama. That branch has never been built.

3

That the portion of the railroad described in petition as running from Madison to Atlanta consisting of 67 miles

of what is termed the main line of said railroad, was constructed under the Act of the Georgia Legislature of 1837.

4

Nearly all the cost of the preceding branch of said railroad was paid with the net earnings of other portions of the railroad for the years 1843, 1844 and 1845, amounting to approximately \$440,000.00, and a bond issue of \$700,000.00.

5

The foregoing bond issue of \$700,000.00 was paid with the net carnings of the railroad.

(S.) Eugene Cook, Attorney General; Claude Shaw, Deputy Assistant Attorney General.

Certificate of service omitted.

[fol. 160] IN UNITED STATES DISTRICT COURT

OPINION DISMISSING COMPLAINT FOR WANT OF JURISDIC-TION-Filed August 10, 1949

This suit is another phase of litigation which has been presented to the courts by various proceedings, in various forms, for more than seventy years. Past litigation, and the present complainant by an Act of the Georgia Legislature in 1833. Full reference to the facts and the questions ultimately involved need not be stated here except by reference to phases of the former litigation which are directly involved here, to-wit: State of Georgia v. Georgia Railroad & Banking Company, 54 Ga. 423; Georgia Railroad & Banking Company v. Wright, 132 F. 912; Wright v. Georgia Railroad & Banking Company, 216 U. S. 420; Georgia Railroad & Banking Company v. Musgrove, 204 Ga. 139, 49 S. E. 2d 26.

In the present proceeding the complainant proceeds against Charles D. Redwine, State Revenue Commissioner of Georgia, to enjoin the assessment and collection of advalorem taxes which is alleged would be contrary to the provisions of complainant's legislative charter, and thus impair the obligation of the contract. The complainant

also seeks to enforce against Redwine, Revenue Commissioner, a previous decree of this Court entered in the case of Georgia Railroad and Banking Company vs. William A. Wright, Comptroller General, in 1907. 132 F. 912 (supra).

The defendant has filed a motion to dismiss, presenting various questions, the one now primarily for determination [fol. 161] asserting that the present suit is in effect one against the State of Georgia, and of which this Court has no jurisdiction because of the provisions of the 11th Amendment to the Constitution of the United States.

Complainant has moved for a judgment on the pleadings and for a summary judgment, and seeks to meet the attack of the defendant's motion upon the ground, principally, that as the result of participation by the Attorney General of Georgia in the former proceeding of 1907 the State waived its immunity from suit, and further, that the suit against the public officer to restrain the enforcement of an unconstitutional Act is not a suit against the State within the provisions of the 11th Amendment.

It seems proper to first consider the effect of the former adjudication of this Court in its decree of 1907 which restrained the defendant from assessing or collecting any taxes contrary to the terms of that decree. If bound thereby, the effect of the decree would require that the threatened assessment and collection of taxes by the det fendant be likewise now restrained. That proceeding ad-

judged the validity of the exemption now involved.

This former suit was between the present complainant, a corporation created under the laws of the State of Georgia, and "William A. Wright, a citizen of the State of Georgia." The defendant was represented by counsel who was the Attorney General of Georgia. He acknowledged service of the subpoena "William A. Wright, by John C. Hart, Attorney at Law and Attorney General [fol. 162] for Georgia." However, the pleadings were signed merely by the named counsel as "Counsel for defendant" and the pleadings for the defendant were entered in the name of "William A. Wright" as an individual. However, the opinion of the Court designates the defendant as "William A. Wright, Comptroller General of the State of Georgia." These references have been made to show

that there is no clear course of designation or conduct which would lead to the conclusion without doubt that the respective parties considered the suit one against Wright in his official capacity and as a representative of the State, or whether he was proceeded against as an individual, to restrain an illegal act threatened to be consummated under color of office.

Without regard, however, to whether the defendant was sued in his individual or official capacity, it is conceded that he was the official of the State charged with the assessment and collection of the taxes in question and, counsel for the complainant, relying upon the principle ruled in Gunter v. Atlantic Coast Line RR Co., 200 U. S. 273, contends that the State in that proceeding waived its immunity from suit by participation in behalf of the defendant by the Attorney General of Georgia, and the tacit adoption of the litigation by a subsequent Governor in his message to the Legislature. To ascertain the validity of this contention it becomes necessary to determine the power of the Attorney General of Georgia, and perhaps of the Governor of the State also, to waive the immunity of the State from suit by participating in, or the utterance of statements concerning, litigation against a State officer which seeks to control his official acts. It is of course established that the State's [fol. 163] waiver of immunity from suit, or its consent to suit, must be expressed by a statate. It becomes necessary then to consider the statutes of the State of Georgia.

The provisions of the statutes in effect at the time of the former suit, which more clearly than any other expresses the power of the Governor or Attorney General to consent to suit, are sections 23 and 220 of the Georgia Code of 1895, which provide:

Sec. 23. "When any suit is instituted against the State, or against any person, in the result of which the State has any interest under pretense of any claim inconsistent with its sovereignty, jurisdiction or rights, the Governor shall, in his discretion, provide for the defense of such suit, unless otherwise specially provided for."

Sec. 220. "It shall be the duty of the Attorney-General ... to represent the State ... in all civil and criminal cases in any court when required by the Governor."

As to suits against the Comptroller General, this officer was authorized "when the services of a Solicitor-General are necessary in collecting or securing any claim of the State in any part of the State, . . . to command the services of said Attorney-General in any and all of such cases . . ."

It will be observed that this statute has reference to "collecting or securing any claim of the State," and not broadly to defense of suits against the Comptroller General.

[fol. 164] It may be noted that these are mere general directions for legal representation and do not form specifically a part of the tax collecting machinery provided by the Georgia statutes as were the South Carolina statutes considered in the case of Gunter vs. Atlantic Coast Line RR Co., 200 U. S. 273. The construction of his powers and authority by the Attorney General, made without regard to pending litigation, throws some light, at least, upon the question. In an address on the "History, Powers and Duties of the Attorney General" by Honorable M. J. Yeomans, then Attorney General of Georgia, Report of the Georgia Bar Association 1937, in stating the things that the Attorney General of the State "may not do," among others, he said:

"1. He cannot consent for the State to be sued. Thave been requested, on several occasions, to consent to a suit being brought against the State. The Attorney General has no such authority. Neither has any other State officer. A consent on the part of the State to be sued must be found in some legislative enactment."

To complete the picture, it should be stated that in his message to the legislature in 1908, then Governor Smith, but who was not Governor at the time the suit was instituted in 1904, considered the litigation as "between the State and the Georgia Railroad and Banking Company." It may be that the proceeding was considered by the parties, counsel, the Court and, while on appeal, by the Governor, as one against the State. Nevertheless, the State, as a Sovereign, when the point is properly presented and relied upon, has the right to attack the attempted waiver of [fol. 165] sovereignty, or consent to suit, by officers not plainly authorized by statute to so subject the State to suit.

In Ford Company vs. Department of the Treasury, 323 U.S. 459, 467, 468, 469, there is a clear holding to this effect. Indeed this proposition does not involve a mere matter of parties or privies, but goes directly to the right of the Soverign to immunity from suit except where it has clearly consented thereto as a Sovereign. Strict enforcement of the rule is essential to prevent this essential attribute from being frittered away by assumed or even pretended waiver of the State's immunity from suit by officers not authorized to do so. The only safe rule in such an instance will appear to be that the only proper basis for declaring consent or establishing waiver must be found clearly expressed in some constitutional or statutory provision directly relating to the subject matter involved. This is the basis of the holding in Gunter vs. Atlantic Coast Line Railroad, supra. which is confidently relied upon by the complainant in the present case. That decision, as appears therefrom, and from the construction given to it in two recent cases. Great Northern Ins. Co. vs. Read, 322. U. S. 47, 56, and Ford Company vs. Department of the Treasury, 323 U.S. 459, supra, is predicated upon the South Carolina statutes, which had reference to an action for the collection of the taxes then involved, and provided that the Attorney General "shall defend said action for and on behalf of the State." The marked difference between the statutes of the State of Georgia and the South Carolina statute just refered to, renders clearly inapplicable the decision in the Gunter case. In view of the provisions of the Georgia statute and the primacy of sovereign immunity from suit Hol. 1661 now asserted, the language of the Supreme Court as to the waiver by individuals of constitutional rights seems apposite, that is that " 'Courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights." Johnson vs. Zerbst, 304. U. S. 464, citing Aetna Insurance Company vs. Kennedy, 301 U. S. 389, 393; Hodges vs. Easton, 106 U. S. 408, 412; Ohio Bell Telephone Co. vs. Public Utilities Commission, 301 U. S. 292, 307. See also, Glasser vs. U. S., 315 U. S. 60, 70.

It is true, as argued by the complainant, that following the decision in the Wright case in this Court, affirmed by the Supreme Court of the United States, no State officer for

many years made any attempt to assess the charter lines of the defendant for ad valorem taxes. The decision in Gunter vs. Atlantic Coast Line Roailroad, supra, gives some weight to this feature, and of course "Administrative construction by a state of its statutes of consent," is entitled to weight. Ford Company vs. Department of the Treasury, supra. The conclusive effect of such official inaction, however, is seriously undermined, if not destroyed, by the action of the present complainant in instituting in the State Court in 1945 a proceeding against the State Revenue. Commissioner of the State of Georgia, first naming him defendant "in his representative capacity," but afterwards amending it to read as against the named individual "who is State Revenue Commissioner of the State of Georgia," and which was afterwards amended to substitute as a party his successors in office as State Revenue Commissioner, as defendants. In that proceeding, the 1907 [fol. 167] decree of this Court was submitted as res adjudicata, as was also the decision of the Supreme Court. of Georgia in State of Georgia vs. Georgia Railroad and Banking Company, 54 Ga. 423. In that proceeding the question was squarely presented by demurrer that the suit was "in reality a suit against the State of Georgia and the State of Georgia has not consented to be made a party to this action or for the action to proceed against it." The trial court overruled this demurrer, but its judgment was reversed by the Supreme Court with directions that the same be sustained, and the petition dismissed because. patently a proceeding against the State without its consent, Musgrove vs. Georgia Railroad & Banking Company, 204 Ga. 139, 49 S. E. 2d 26. Appeal to the Supreme Court of the United States was dismissed. Georgia Railroad & Banking Company vs. Musgrove, 835 U. S. 900. The Supreme Court of Georgia expressly referred to the former litigation in this Court and directed attention to the fact that in that case the question of the State's consent to suit was not raised. The Gunter Case, supra, was cited in the decision and the Supreme Court of Georgia plainly did not consider the law of Georgia to be to the same effect as that of South Carolina there considered. The question of waiver and the construction of the effect of the former decree was directly presented, for a copy of the entire record of the Wright case in this Court and in the Supreme. Court of the United States was attached as a part of the

petition in support of the plea of res adjudicata and as an estoppel. This holding by the highest Court of the State of Georgia upon the identical issues now sought to be presented, that the proceeding was one against the State and therefore not maintainable without the State's consent, is [fol. 168] more than an "administrative construction" and is a holding by every fair implication that the Georgia statutes did not provide authority for the officers participating in the former litigation to waive the State's immunity from suit or evidence its consent. In these circumstances, the admitted inaction of the State officials for calong period of time is entitled to no compelling force in determining the effect of the participation by the State of-

ficers in the former litigation.

The present defendant urges the decision in the Musgrove case, supra, as res adjudicata upon the principle stated in 50 Corpus Juris Secundum, page 15, section 597, as follows: "Although it has been said that, when a cause has been once fairly tried, it should not be tried again, even if the parties are willing, it is nevertheless a general rule that a party entitled to claim the benefit of a former judgment may waive or estop himself to assert such right. So, where a party . . . joins issue on the very questions settled by the judgment, or voluntarily opens an investigation of the matters which he might claim to be concluded by it, . . . he will be held to have waived the benefit of the estoppel, and the case may be determined as though no such former judgment had been rendered." In this case we find it unnecessary to explore this principle to its fullest extent as an application of res adjudicate. It nevertheless seems to be pertinent in determining the effect to be given to the provisions of the Georgia statutes and the circumstances surrounding the former litigation in this Court, as well as the inaction of the State officers since the rendition of the decree therein.

It is concluded that no sufficient showing is made that in the original proceedings in this Court the State [fol. 169] waived its immunity from suit or became bound by the decree. The question is therefore open, and being now asserted in bar of the present proceeding, it must be sustained.

The complainant contends that even if the State be not bound, it is nevertheless entitled to proceed by the present action as ancillary to the original suit against the defendant

successor in office of William A. Wright, the Comptroller General of Georgia, defendant in the original suit! Under the law of Georgia defendant, Redwine, as the State Revenue Commissioner of the State of Georgia; is in effect the successor in office of the Comptroller General. However, this question is immaterial, for as well demonstrated in Musgrove vs. Georgia Railroad and Banking Company, supra, the suit is in substance and direct effect an action against the State, and not maintainable without its consent when the point is properly presented, as it now is. In view of the well considered opinion and discussion by Mr. Justice Bell in that case, no further discussion on this point is necessary here, except by reference. Complainant contends that the true holding of the Georgia Supreme Court in the case just mentioned is that a proceeding for declaratory judgment would not lie. Even if this were true, the opinion is nevertheless sound and controlling upon the points here involved, but it must be borne in mind that as clearly appears, that proceeding was also one for an injunction, and as to this feature, substantially identical with the present proceeding.

For the reasons just stated, it is clear that the effort to enforce the prior decree, as well as the relief sought by the ancillary proceedings are both proceedings against the

[fol. 170] State, which are not permissible.

Complainant further contends that the 11th Amendment does not prohibit suits against a State official to enjoin the enforcement of a State tax law, or any other State law, contrary to the Constitution of the United States, and numerous authorities are cited in support of this contention. It of course must be conceded that in proper circumstances, and especially where there is involved no specific performance of a contract by the State, a suit against a State official to restrain illegal action, has been held not to be such a suit against the State as is prohibited by the 11th Amendment. It is not necessary to enter upon any extended discussion of the numerous adjudications which sustain the general proposition asserted by the complainant. There are adjudications which contain language, not directly controlling or involved in the case, to the effect that even where a contract of the State is involved, the assertion of gestraint against the State official is not a suit against the State. However, none of these determines the

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particular point here involved, and that is, as clearly stated in In re Ayers, 123 U. S. 443, 502, a ruling which has not been departed from, that "A bill in equity for the specific performance of the contract against the State by name, it is admitted could not be brought. In Hagood v. Southern, 117 U. S. 52 it was decided that in such a bill, where the State was not nominally a party to the record, brought against its officers and agents, having no personal interest in the subject matter of the suit, and defending only as representing the State, where 'The things required by the decree to be done and performed by them are the very things which, when done and performed, constitute a [fol. 171] performance of the alleged contract by the State, the court was without jurisdiction, because it was a

suit against a State.

"The converse of that proposition must be equally true, because it is contained in it: that is, a bill, the object of which is by injunction, indirectly, to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, must also, necessarily, be a suit against the State. In such a case, though the State be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things. which constitute a breach of its contract, the suit is still, in substance, though not in form, a suit against the State." As clearly pointed out in the decision in that case, the point to be borne in mind in applying the principle of the authorities is that a suit predicated upon a contract with the State, (the one in the present case alleged to be prescribed by the complainant's charter), by enjoining the act of an officer and to indirectly compel the specific performance of the contract, "by forbidding all those acts and doings which constitute breaches of the contract, must / . . be a suit against the State." The present suit is predicated upon the claim that the assessment and collection against its charter tax lines, as otherwise permitted by the statute, would constitute an impairment of the obligation of the contract so that the principle of the Ayers case is inescapably applicable, because to grant the relief here sought will require the State to comply with and perform its contract of exemption. In fact, there is no claim of unconstitutionality in the statute under which the defendant threat-[fol. 172] ens to proceed, but merely that because of the

contract, such procedure would unconstitutionally impair the obligation of the contract. The State is the contracting party, and an injunction against its officer in this case would be merely an enforcement of the State's contract in a suit in which it has not consented to be sued. Avers, supra, p. 503.

Therefore, the defendant official has in this case not merely urged the State's immunity as justification for his intended official acts, -he has established that the suit is in

fact against the State.

The Gunter case referred to above involved a charter exemption from taxation. Its language that a suit against State officers to enjoin them from enforcing an unconstitutional tax was not a suit against the State within the prohibition of the 11th Amendment, was clearly not considered controlling upon the contract feature of the case, or else it would not have been necessary to determine what was considered the actual question involved, that is, whether the State had waived its immunity from suit. In the other adjudications cited by the complainant, there was either no express contract by the State involved, or this question was not considered controlling, or the point was not raised. So it may be stated that there is no opinion subsequent to the Ayers case, supra, which expressly, or by necessary implication, weakens its controlling effect.

Under our dual system of Government, recognition of the right and power of a State as a Sovereign, is of course essential and well-understood. The importance of maintaining State sovereignty and immunity from suit in a [fol. 173] proper case, as provided by the 11th Amendment, (the history of which need not be repeated here) is such that we have fully considered that question as here presented without regard to the ultimate merits of the contentions of the complainant as they are here, or may be hereafter, asserted when and if the State may itself move against the complainant in breach or avoidance of the contract of exemption from taxation provided in the complainant's charter. Thus, without any expression upon the ultimate merits of the case, but upon determination that the proceeding is in effect one against the State and prohibited by the 11th Amendment, we conclude that this Court is without jurisdiction of the present proceeding and that the motion of the defendant now urged in effect on behalf of the State, should be, and the same hereby is, sustained,

The complaint accordingly is dismissed for want of jurisdiction in this Court to entertain the same.

This the 29th day of July 1949.

Leon McCord, United States Circuit Judge. Robert L. Russell, United States District Judge.

[fol. 174] IN UNITED STATES DISTRICT COURT

DISSENTING OFINION—Filed Aug. 10, 1949

I respectfully dissent from the majority opinion in this

case.

There is no necessity for my giving a lengthly statement of the facts in this case. Suffice to say that the State of Georgia for over seventy years has, by various procedures and various forms, been trying to vitiate or nullify this contract in question which is the basis of this suit under consideration. (City of Augusta Vs Georgia Railroad & Banking Company, 26 Georgia, 651, 662, et seq.; The State of Georgia, Vs Georgia Railroad & Banking Company, 54 Georgia, 423; Goldsmith, Comptroller Sc., Vs Georgia Railroad & Banking Company, 62 Georgia, 485.)

Judge Newman of this court (Northern District of Georgia), on the 3rd day of July, 1907, decided the contract at issue between the State of Georgia, acting by and through its Legislature and Governor and The Georgia Railroad & Banking Company was a valid and binding contract. Judge Newman's decision was affirmed by the Supreme Court of the United States in the case of Wright, Comptroller, Vs The Georgia Railroad & Banking Com-

pany, U. S. Supreme Court 216, page 420.

[fol. 175] The plaintiff in this case, The Georgia Railroad & Banking Company has filed a motion for judgment on the pleadings or for summary judgment. The defendant has filed a motion to dismiss. The majority of this court has decided to sustain the motion to dismiss for reasons as set forth in their decision. I am deciding in favor of a judgment on the pleadings or summary judgment as follows:

I believe this Court has jurisdiction because this action is an ancillary or supplemental bill to effectuate or enforce a prior decree of this court as hereinabove stated. (See also Root Vs Woolworth, 150 U.S. 201. Gunter Vs Atlantic

Coast Line Railroad, 200 U. S. 273.) The State of Georgia is therefore before this court by reason of these decisions. Being before this court this action is merely, as stated above, simply an action to effectuate the prior decree of this court.

I do not believe the case of Musgrove Vs The Georgia Railroad Banking Company, 49 S. E. 2d 26, cited by The State of Georgia and the majority of this court is applicable to this case, because that case merely decided the question of state practice and did not decide this particular federal question, or any other federal question.

The judgment of this Court as affirmed by the Supreme Court of the United States is conclusive on the validity and effect of the contract of exemption not only as against the contentions actually urged in that case but as against all contentions that could have been urged. (See Gunter Vs Atlantic Coast Line, 200 U. S. 273; Deposit Bank Vs Frankfort, 191 U. S. 499; New Orleans Vs Citizens Bank, 167 U. S. 371; Montgomery Vs Thomas (C. C. A. 5), 146 F. (2d) 76; Leininger Vs Commissioner (C. C. A. 6), 86 F. (2d) 791.

July 29, 1949.

Respectfully,

F. M. Scarlett, U. S. District Judge, for the Southern District of Georgia.

[File endorsement omitted.]

[fol. 176] IN UNITED STATES DISTRICT COURT

Motion for Rehearing and to Alaur Judgment-Filed Aug. 19, 1949

Plaintiff, Georgia Railroad & Banking Company, moves the Court to grant a rehearing and reconsider the judgment entered August 10, 1949, dismissing the complaint for want of jurisdiction, and to alter and set aside said judgment and to enter judgment for plaintiff as moved in plaintiff's prior motion.

As grounds for this motion plaintiff shows:

1

In holding that the action was a suit against the State within the prohibition of the 11th Amendment and in dismissing the action on that ground, the Court overlooked or failed to apply the repeated decisions of the Supreme Court of the United States holding that such action is not an action against the State.

Board of Liquidation v. McComb, 92 U. S. 531.

Allen v. B. & O. Railroad, 114 U. S. 311.

Gunter v. Atlantic Coast Line Railroad, 200 U. S. 273.

In each of the above cases the action was to enjoin a state official from enforcing a state tax on the grounds that such tax impaired a contract between the state and plaintiff. In each case the Supreme Court held that such action was not against the state within the meaning of the 11th Amendment.

In addition, the Supreme Court has in many cases affirmed injunctions against state officials enjoining the collection of a tax contrary to contractual exemption from tax, two of the cases involving this very charter.

Wright v. Georgia Railroad & Banking Co., 216 U. S., 420.

[fol. 177] Wright v. L & N Railroad, 236 U. S. 687. Wright v. Central of Georgia Railroad, 236 U. S. 674. Powers v. Detroit & Grand Haven Railway, 201 U. S.

Wright v. Sills, 2 Black 544.

Humphrey v. Pegues, 16 Wall. 244. Tomlinson v. Branch, 15 Wall. 460. Dodge v. Woolsey, 18 Howard 331.

In the latter cases the court did not discuss the question of whether the action was against the state, both the court and the parties considering the question so well settled as not even to merit discussion.

The above cases on suits against the Sovereign were exhaustively considered and reaffirmed in the recent case of Larson v. Domestic & Foreign Commerce Corporation, decided June 27, 1949, 69 Sup. Ct. 1457. In that case the court, after review of the authorities, held that if the action of the state official had not been authorized by the state and was ultra vires, the suit to enjoin such action was not against the state because it did not interfere with any action the state had properly authorized. In the same way if the statute under which the state official was threatening to act, or if his actions, were contrary to the constitution,

then such actions were not actions of the state because the state had not and could not constitutionally authorize such actions.

There may be, of course, suits for specific relief against officers of the Sovereign which are not suits against the Sovereign. . . . Where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sov-The officer is not doing the business ereign actions. which the Sovereign has empowered him to do or he is doing it in a way which the Sovereign has forbid-His actions are ultra vires his authority and therefore may be made the object of specific relief. . [fol. 178] "A second type of case is that in which the statute or order conferring power upon the officer totake action in the Sovereign's name is claimed to beunconstitutional. Actions for habeas corpus against. a warden and injunction against the threatened enforcement of unconstitutional statutes are familiar examples of this type. Here too the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the Sovereign. The only difference is that in this case the power has been conferred in form but the grant is lacking in substance because of its constitutional invalidity."

This case falls squarely within the rule there laid down. The constitutional and statutory provision under which Redwine threatens to act are contrary to the Constitution of the United States and therefore are a nullity and void. Indeed, they have been so held both by the Supreme Court of Georgia and by the Supreme Court of the United States. Therefore, Redwine has not been authorized by any valid statute of Georgia to take the action he threatens to take. His acts are and will be beyond his authority and ultra vires. Therefore, as the Supreme Court has said, such acts, not having been validly authorized, will not be the acts of the State of Georgia and an injunction restraining such acts will not restrain the State of Georgia and is not within the prohibition of the 11th Amendment.

The Court misconstrues the decision in Gunter v. Atlantic Coast Line, 200 U.S. 273. The Gourt did not hold that consent of the state was necessary to a suit to enjoin an officer from collecting unconstitutional tax. On the contrary, the court said, without qualification:

"A suit against state officers to enjoin them from enforcing a tax alleged to be in violation of the Constitution of the United States is not a suit against the State within the prohibition of the Eleventh Amendment."

The discussion of consent and waiver in the prior case dealt only with the effect of the prior decree as reg judicata and with the application of Sec. 720 prohibiting injunction [fol. 179] against suits in the State Court. The Supreme Court held that Sec. 720 has no application to ancillary actions to enforce the prior decree by enjoining suit in the State Court.

The Court also misconceived the effect of In Re Ayers, 123 U.S. 443. In that case Virginia had issued bonds which provided that the coupons would be receivable in payment of all taxes due the state. Thereafter the state passed a statute providing that suit be brought against all taxpayers who had tendered such coupons and that in such suits the taxpayer be required to prove that the coupons were genuine and not counterfeit. The plaintiff in the action was not a taxpayer but was a person who had bought the coupons for resale. He alleged the effect of the statute was to depreciate the value of the coupons he had bought. He prayed that the Attorney General be enjoined from bringing any such suits and be required to dismiss those brought. The Attorney General was enjoined from bringing suit in the name of Virginia and was ordered to dismiss an action pending in the name of the State of Virginia. When he refused he was attached for contempt and appealed.

In that case, as the Supreme Court pointed out, the action for which the Attorney General was held in contempt was refusal to dismiss a petition brought in the name of the State of Virginia. Certainly it was within the authority of the Attorney General to bring or dismiss an action in the name of the State and an order requiring him to dismiss such action certainly required him to act as an official and

not as an individual.

But where the action was to enjoin the officer from levying on property after there had been a proper tender of the coupons, the Supreme Court specially held that the injunction was proper and that the action was not against the state within the meaning of the 11th Amendment, the same Justice writing both opinions.

[fol. 180] Allen v. Baltimore & Ohio Railroad Co., 114 U. S. 311;

Poindexter v. Greenhow, 114 U.S. 270.

The Supreme Court in the Ayers case expressly reaffirmed the doctrine in the Allen and Poindexter cases and specifically said that nothing decided in the Ayers case was in-

tended to impinge the principle of those cases?

Plaintiff in this case clearly falls within the rule of the Allen case and not the Ayers case. Plaintiff does not ask that Redwine be required to take or refrain from taking any action in the name of the State of Georgia or any action which the State of Georgia has validly authorized. It merely prays that he be enjoined from seizing property of plaintiff, which he has not been authorized, and which he cannot constitutionally be authorized, by the State of Georgia to seize. Such action is not an action against the State under the repeated decisions of the Supreme Court, reaffirmed as recently as June of was year in the Larson case, 69 Sup. Ct. 1457.

9

The decision of the Court is inconsistent in that it holds that the prior decree of the court, affirmed by the Supreme Court, is not binding on the State or its subordinate officials because the prior action was against Wright as an individual and not against the State, while the decision holds that the present action may not be maintained because it is against the State and not against Redwine as an individual. Yet the two proceedings are cast in exactly the same form and pray precisely the same remedy.

If the prior decree was against the State, the State and all of its subordinate officials are bound by it. The State cannot, after final decree, contend that the prior proceeding was beyond the jurisdiction of the court. The final decree adjudicates that the court had jurisdiction, just as it adjudicated every other point necessary to a decree. The Supreme [fol. 181] Court has repeatedly held that the contention cannot be made after final decree that the federal court was

without jurisdiction of the original action, even though such lack of jurisdiction appears on the face of the record.

Chicot County Drainage Dist. v. Baxter State Bank, 308

U.S. 371;

Dowell v. Applegate, 152 U. S. 327.

The Court of Appeals of Georgia has also held that the State cannot, after final judgment, contend that suit against the State was not properly brought, even though the Supreme Court in the meantime has held in another case that such suit could not be brought against the State. The Court of Appeals holds that the judgment concludes the question.

Thompson v. Continental Gin Co., 73 Ga. App. 694.

The case of Ford Co. v. Department of Treasury, 323 U. S. 459, is not to the contrary. In that case the objection that the action was against the State without its consent was raised prior to final decree. It is settled that jurisdiction of a federal court may be raised by the Supreme Court on its own motion at any time before final decree, but cannot be raised after decree has been entered and has become final.

3

It is not necessary that the prior action have been against the State in order that the State and its subordinate officials be bound thereby and in order that the court have ancillary jurisdiction to enforce that decree against Redwine.

It is well settled that a person interested in a case who employs counsel to defend it, or otherwise participates in the defense is bound thereby as fully as if he had been a

party to the record.

"One who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in [fol. 182] aid of some interest of his own, and who does this openly to the knowledge of the opposing party, is as much bound by the judgment and as fully entitled to avail himself of it as an estoppel against the adverse party, as he would be if he had been a party to the record."

Souffront v. Campagne des Sucreries, 217 U.S. 475, 487.

This rule applies equally to the Sovereiga.

"If the United States in fact employs counsel to represent its interest in a litigation or otherwise actively aids in its conduct, it is properly enough deemed to be a party and not a stranger to the litigation and bound by its result."

Drummond v. United States, 324 U. S. 316, 318. United States v. Candelaria, 271 U. S. 432.

4

The Court, in its opinion, says that no sufficient showing has been made that the Governor authorized or directed the Attorney-General to defend the prior action. The Court overlooks the fact that the proceeding is before the Court on motion, and that the judgment is one dismissing the complaint on motion and not after hearing on the merits. If, as the Court contends, plaintiff's motion for summary judgment does not sufficiently show this authority, plaintiff is entitled to an opportunity to make such showing, if it can, on final hearing on the merits.

This is particularly important in view of the fact that the files both of the Governor's office and of the Attorney General's office for the years 1900 through 1910 are lost and

plaintiff has not yet been able to locate them.

Robert B. Troutman, Furman Smith, Counsel for Plaintiff, Georgia Railroad & Banking Co.

Note: Notice and Acknowledgment of Service Omitted.

[fol. 183] IN UNITED STATES DISTRICT COURT

AMENDMENT TO MOTION FOR REHEARING AND TO ALTER JUDG-MENT—Filed September 16, 1949

Comes now plaintiff, Georgia Railroad & Banking Company, and amends its motion heretofore filed for a rehearing and to reconsider, alter and set aside the judgment entered August 10, 1949, by adding thereto the following additional ground:

O

The holding of this Court that plaintiff cannot bring judicial proceedings to test the validity of the tax proposed to be assessed against and collected from plaintiff, or to prevent the seizure of its property for such taxes, together with the failure of the law of Georgia to give to plaintiff any opportunity for hearing on the validity of such tax, will have the effect of depriving plaintiff of its property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States and contrary to Article I, Sec. 1, par. 3, of the Constitution of Georgia.

The Supreme Court has held "that the assessment of a tax is action judicial in its nature, requiring for the legal exertion of the power such opportunity to appear and be heard as the circumstances of the case require" and "that due process of law requires that after such notice as may be appropriate the taxpayer have opportunity to be heard as to the validity of the tax", and that if the state law does not otherwise grant a remedy for contesting the tax, the Constitution requires that the taxpayer have the right to enjoin the state taxing officials from assessing and collecting such tax:

Central of Georgia Railway v. Wright, 207 U.S. 127.

Turner v. Wade, 254 U. S. 64.

[fol. 184] Lipke v. Lederer, 259 U. S. 557.

Regal Drug Corporation v. Waddell, 260 U. S. 386.

As alleged in the complaint and pointed out in the plaintiff's brief, the Georgia law does not afford plaintiff any, opportunity to be heard on the validity of the tax or any procedure for resisting the tax. Therefore, unless plaintiff is permitted to enjoin the taxing officials from wrongfully assessing and collecting such tax, its property will be seized without due process of law. The Fourteenth Amendment to the Constitution of the United States imperatively requires that plaintiff be given the right to enjoin such illegal tax, in the absence of other procedure for contesting such tax.

Robert B. Troutman, Furman Smith, Attorneys for Plaintiff, 434 Trust Company of Georgia Bldg., Atlanta, Georgia.

Note: Certificate of Service Omitted.

[fol. 185] IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION FOR REHEARING—Filed October 3, 1949

In written argument on motion for rehearing, counsel for complainant contends that the opinion of the majority is subject to the construction that it forbids any resistance by complainant to the actual levy and sale of its property by the State for the collection of taxes. Without intimating any agreement whatever with this view of the effect of the order of the Court dismissing the complaint, there appears no objection to further clarification of the order of the majority by the statement that the Court did not intend to, and did not, hold that if and when the State itself proceeded to levy upon and sell any of the property of the complainant, the complainant was debarred from contesting the validity of the claim sought to be asserted. We did not, and do not now, intimate any advisory opinion as to the proper remedy of the complainant in such circumstances since, as heretofore held, the present proceeding may not be maintained against the State. The motion for rehearing is denied.

This the 3rd day of October, 1949.

(S.) Leon McCord, United States Circuit Judge; Robert L. Russell, United States District Judge.

[fol. 186] IN UNITED STATES DISTRICT COURT,

Petition for Appeal—Filed October 6, 1949.

To the District Court of the United States for the Northern District of Georgia, Newnan Division, and to the Honorable Robert L. Russell, One of the Judges Thereof:

The Georgia Railroad & Banking Company, feeling itself aggrieved by the judgment entered in this cause on August 10, 1949, dismissing the complaint for want of jurisdiction, and the judgment entered October 3, 1949, modifying the opinion and overruling the motion of petitioner to grant a rehearing and alter and set aside said judgment, does hereby appeal from said judgments to the Supreme Court of the United States, for the reasons and on the grounds

stated in the assignments of error filed herewith, and petitions that this appeal be allowed, and that an order be entered fixing the amount of bond to be given by said plaintiff as appellant conditioned as the law provides, and that eitation issue as provided by law and that a transcript of the record upon which said judgments and based, duly auffol. 187] thenticated, be transmitted to the Supreme Court of the United States at Washington, D. C., in order that the errors complained of may be considered and corrected.

Robert B. Troutman, Furman Smith, Attorneys for Plaintiff.

Spalding, Sibley, Troutman & Kelley, 434 Trust Company of Georgia Bldg., Atlanta, Georgia, of Counsel for Plaintiff.

[fol. 188] IN UNITED STATES DISTRICT, COURT

ORDER ALLOWING APPEAL—Filed October 6, 1949

Georgia Railroad & Banking Company, plaintiff in the above stated case, having filed its petition for appeal to the Supreme Court of the United States from the judgment entered August 19, 1949, dismissing the complaint for want of jurisdiction, and from the judgment entered October 3, 1949, overruling the motion for rehearing and to alter and set aside said judgment, together with its assignments of error and together with its statement disclosing the basis on which it is contended that the Supreme Court had jurisdiction, as required by Rule 12,

It is ordered that said petition be and the same is hereby granted and the appeal allowed, upon said petitioner giving bond for costs as required by law in the sum of \$250.

This the 6th day of October, 1949.

Robert L. Russell, United States District Judge.

[fol. 189] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed October 6, 1949

Comes now the plaintiff, Georgia Railroad & Banking Company, in connection with its petition for appeal to the Supreme Court of the United States from the judgment dismissing its complaint for want of jurisdiction and from the judgment overruling its motion for rehearing, and says the Court erred in the following respects and assigns the following errors for the reversal of said judgment:

1

The Court erred in sustaining the defendant's motion to dismiss and in dismissing plaintiff's complaint.

2

The Court erred in not sustaining plaintiff's motion to enter a judgment on the pleadings in favor of plaintiff and in not entering judgment on the pleadings in favor of plaintiff as moved in said motion.

[fol. 190]

3

The Court erred in not systaining plaintiff's motion for a summary judgment in favor of plaintiff and in not entering a summary judgment in favor of plaintiff as prayed in said motion.

The Court erred in not sustaining plaintiff's motion for an interlocutory injunction and in not granting an interlocutory injunction as prayed in plaintiff's motion.

5

The Court erred in holding that the action was an action against the State of Georgia within the prohibition of the 11th Amendment to the Constitution of the United States.

The Court erred in not holding that defendant had not been authorized by any valid, constitutional law to seize the property of plaintiff, and therefore he should be enjoined as a wrongdoer from such threatened seizure, and the State of Georgia, not having validly authorized such acts, would not be a party to such acts and would not be enjoined by such injunction.

7

The Court erred in not holding that the provision of the charter of plaintiff set out in the complaint was an irrevocable contract and that the provisions of the Constitution and laws of Georgia referred to in the complaint were unconstitutional and void as against plaintiff on the grounds that they impaired the obligation of said contract contrary to Sec. 10 of Art. I of the Constitution of the United States.

[sols. 191-199]

R

The Court erred in not holding that defendant was bound by the previous decree of said Court, as modified and affirmed by the Supreme Court of the United States, and in not holding that the Court had jurisdiction to enforce its prior decree, and in not entering appropriate orders to carry out and enforce said prior decree.

9

The Court erred in holding that plaintiff cannot maintain any action to prevent the levy and collection of the claimed taxes on its property and the seizure of its property for such claimed taxes, for the reason that such decision will sesult in plaintiff being denied any opportunity to be heard on the validity of the tax and will result in plaintiff being deprived of its property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States and contrary to Article I, Sec. 1, par. 3 of the Constitution of Georgia.

Wherefore, plaintiff prays that said judgment dismissing the complaint be reversed and that the cause be re-

manded to the District Court with instruction to enter significant judgment for plaintiff as prayed.

Robert B. Troutman & Furman Smith, Attorneys for

Plaintiff.

Spalding, Sibley, Troutman & Kelley, 434 Trust Company of Georgia Bldg., Atlanta, Georgia, of Counsel, for Plaintiff.

[fols. 200-201] Citation in usual form showing service on Eugene Cook, filed Oct. 7, 1949, omitted in printing.

[fol. 202] IN UNITED STATES DISTRICT COURT

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed October 7, 1949

To the Clerk:

Please prepare transcript of the record in the above entitled cause in the matter of appeal therein to the Supreme Court of the United States and include in said transcript the following:

1. Complaint.

2. The answer and defenses of defendant.

3. The amendment to the answer and motion to dismiss of defendant.

4. The request for admission under Rule 36 filed by plaintiff and the exhibits attached thereto.

5. Answer of defendant to request for admission.

6. Motions of plaintiff for judgment on pleading, summary judgment, or interlocutors injunction, and exhibits attached thereto.

7. Judgment entered August 10, 1949, and opinion of Court.

8. Motion for rehearing and to alter and set aside said judgment, filed August 19, 1949.
[fol. 203] 9. Amendment to said motion filed September 16, 1949.

10. Order entered October 3, 1949, modifying the opinion

and overruling said motion.

11. Petition for appeal to the Supreme Court.

12. Assignments of error.

13. Statement as to jurisdiction.

14. Order allowing appeal.

15. Citation, with proof of service.

46. Notice served on appellee of petition for appeal, order allowing appeal, assignments of error and statement as to jurisdiction, together with acknowledgment of service thereon.

17. This praccipe,

This the 7th day of October, 1949.

Robert B. Troutman, Furman Smith, Attorneys for Appellant.

Service of the foregoing praecipe acknowledged this the 7 day of October, 1949.

Eugene Cook, Attorney Gen., Attorneys for Appellee, by: J. R. Parham, Asst. Attorney Gen.

[fols. 204-208] IN UNITED STATES DISTRICT COURT

PRAECIPE OF APPELLEE-Filed October 18, 1949

To the Clerk:

Please include in the transcript of the record in the above entitled cause in the matter of appeal therein to the Supreme Court of the United States, the following:

- 1. The request for admission under Rule 36 filed by defendant.
 - 2. This Praecipe of defendant.

This the 18 day of October, 1949.

Eugene Cock, the Attorney General; M. H. Blackshear, Jr. Assistant Attorney General.

Note: Service omitted;

[fols. 209-210] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 211] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF RECORD—Filed November 21, 1949

Pursuant to Rule 13, par. 9, appellant states that he intends to rely on all the points in his assignments of error, and the assignment of error is adopted as the statement of the points on which appellant intends to rely:

Appellant deems the entire record; as filed in the above entitled cause, necessary for consideration of the points relied upon.

Robert B. Troutman, Furman Smith, Attorneys for Appellant.

Due and legal service of the foregoing statement of the points on which appellant intends to rely and designation of the record acknowledged this the 18th day of November, 1949.

Eugene Cook, Attorney General; M. H. Blackshear, Jr., Asst. Atty. Gen'l, Attorneys for Appellee.

*[fol. 211a] [Pile endorsement omitted]

[fol. 212] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—December 5, 1949

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

Mr. Justice Douglas took no part in the consideration or decision of this question.

Endorsed on Cover: File No. 54,203. U. S. D. C., Northern Georgia. Term No. 454., Georgia Railroad & Banking Company, Appellant, vs. Charles D. Redwine, State Revenue Commissioner. Filed November 12, 1949. Term No. 454 O. T. 1949.

SUPREME COURT, U.S.

Office - Supreme Court, U. S. FILED

NOV1 2 1949

In the Supreme Court.

of the United States

No. 454 4 1950

GEORGIA RAILROAD & BANKING Co.,
Appellant

CHARLES D. REDWINE, State Revenue Commissioner,

Appellee

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

ROBERT B. TROUTMAN .
FURMAN SMITH
Counsel for Appellant

Spalding, Sibley, Troutman & Kelley 434 Trust Company of Georgia Building Atlanta, Georgia

Of Counsel for Appellant

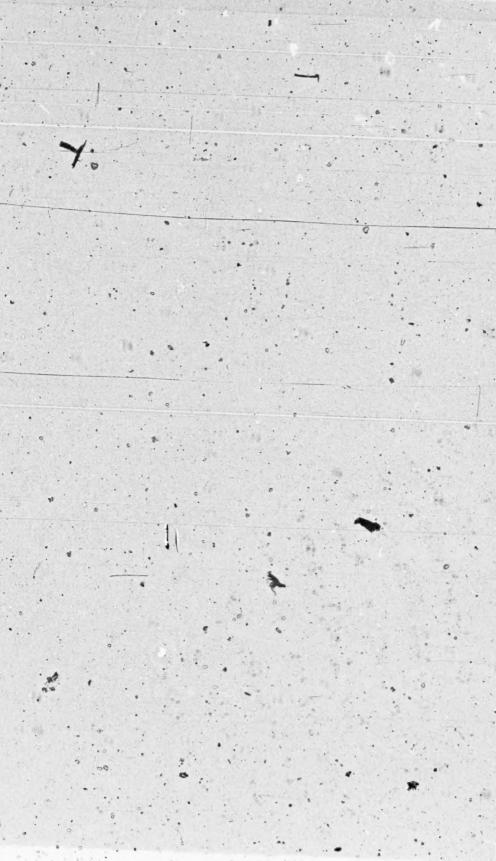


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In the Supreme Court of the United Staies

GEORGIA RAILROAD & BANKING Co.,
Appellant

VS.

CHARLES D. REDWINE, State Revenue Commissioner,

Appellee

GEORGIA.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Jurisdiction of Appeal Conceded.

Appellee admits that the appeal is one of which the Supreme Court has jurisdiction (His Motion, page 1), but contends that it should be dismissed or affirmed because the merits of the appeal are so unsubstantial as not to require argument or consideration by the Court.

Action Not Prohibited by 11th Amendment.

In order to sustain the judgment of the Court below it will be necessary for this Court to overrule two decisions of this Court involving this same appellant, or its lessees, and involving this same charter provision and brought in precisely the same manner as this case.

Wright v. Georgia Railroad & Banking Co., 216 U. S. 426.

Wright v. Louisville & Nashville Railroad Co., 236 U. S. 687.

If appellee is right in his contentions in this case, then the Court was without jurisdiction of both of the above cases and both were wrongly decided, for both of the above cases were precisely the same action as this case.

In addition this Court has directly decided that a suit to enjoin the collection of a tax on the grounds that it is contrary to a contractual provision in the charter of the plaintiff is not a suit against the State.

> Allen v. B & O Railroad, 114 U. S. 311.

Gunter v. Atlantic Coast Line, 200 U.S. 273.

Board of Liquidation v. McComb, 92 U. S. 531r

Affirmance of the judgment of the trial court will in effect overrule the above cases.

Certainly it cannot be said that an appeal based squarely on the repeated decisions of this Court, which have never been overruled or questioned, is so unsubstantial as to require dismissal or affirmance without consideration.

Appellee cites no decision of this Court in support of his contention that the judgment of the trial court should be affirmed on the grounds decided by the District Court.

Appellee is in error in his statement in Section 2 of his motion that the decision of the Supreme Court of Georgia in Musgrove v. Georgia Railroad & Banking Co., 204 Ga. 139, was affirmed by this Court. On the contrary, the appeal was dismissed by

this Court on the grounds that the Supreme Court of Georgia decided only a question of Georgia practice not involving any federal question and that this Court was therefore without jurisdiction.

Georgia Railroad & Banking Co. v. Musgrove; 335 U. S. 900.

In his motion to dismiss that case, appellee said:

"Appellant bases its appeal on an erroneous assumption that the Supreme Court of the United States will assume jurisdiction on a decision of a State Court construing a State Statute providing for certain actions which may be filed in State Courts. The petition of Appellant against Appellee was based on a new statute, that of 1945 authorizing the granting of declaratory judgments in certain cases. The decision of the Supreme Court of Georgia ordered the petition dismissed on the grounds that declaratory judgment was not Appellant's remedy."

This Court agreed with appellee in that case and dismissed the appeal on that ground.

The dismissal of an appeal from the Supreme Court of Georgia on the grounds that the Georgia Court decided only a question of State practice not involving any federal question. certainly cannot be an adjudication of the right to sue in the Federal Court, which is certainly based on federal law.

Court Has Jurisdiction to Enforce Prior Decree.

If, as appellee contends and the court below held, this action

is against the State of Georgia, then the prior decree, affirmed by this Court (Wright v. Georgia Railroad & Banking Co., 216 U. S. 420), was equally against the State of Georgia, for the two actions are cast in exactly the same form and pray exactly the same relief. And if the prior decree was against the State of Georgia, then the State of Georgia is bound by that decree and the court below had jurisdiction to enforce its decree. The immunity of the State from suit is a personal privilege that may be waived, and is waived by permitting the suit to go to final decree without objection. The State cannot litigate to final decree, taking its chances of winning, and then after the decree has become final ignore it on the grounds that the action was against the State.

Gunter v. Atlantic Coast Line, 200 U. S. 273.

The final decree affirmed by this Court adjudicated that the court below had jurisdiction, just as it adjudicated every other fact necessary for the decree.

Chica County Drainage Dist. v. Baxter State Bank, 308 U. S. 371.

And if, as appellant contends, the prior action was not originally against the State, even so when the State through its duly authorized officers not only defended the action on behalf of the State but affirmatively asked the Court to decide the question on behalf of the State, the State became bound thereby as fully and to the same extent as if it had been a party.

Gunter v. Atlantic Coast Line, 200 U. S. 273.

Souffront v. Campagne des Sucreries, 217 U.S. 475.

Drummond v. United States, 324 U. S. 316.

Appellee is in error in his statement that appellant in bringing its action in the State Court was "completely ignoring the judgment now sought to be enforced." On the contrary, appellant expressly pleaded that judgment as res judicata in the action in the Georgia Court and prayed that it be enforced. Appellant went into the Georgia Court first because it feared that an action in the Federal Court might be dismissed under the Johnson Act (28 U.S.C. 1341) on the grounds that appellant had an adequate remedy by declaratory judgment in the State Court. That fear has certainly been removed by the decision of the Supreme Court of Georgia.

No Remedy in Courts of Georgian

In Section 3 of his motion appellee says that the appeal should be dismissed or affirmed on the grounds that appellant has a plain, speedy and efficient remedy in the courts of Georgia. He does not, however, favor the Court with a statement of what those remedies may be. In the court below he was unable to point out to the Court any plain remedy which appellant might have in the courts of Georgia. On the contrary he admitted in argument that he would contend that any remedy appellant might adopt in the courts of Georgia was not a proper remedy.

Since appellee does not suggest what remedy appellant might have in the courts of Georgia, it would extend this brief too long to discuss every conceivable remedy and show that such remedy is not available.

Contractual Provision as to Taxes is Valid.

In Section 4 of his motion, appellee asks the Court to overrule the two prior decisions of this Court upholding the validity of the charter contract on the grounds that the railroad did not build all of the lines it was authorized to build, although this fact was apparent on the record in both of the earlier court cases.

Neither this Court nor any other Court has ever decided that a contractual provision as to taxation in the charter of a railroad is void if the railroad does not exercise every power which it is authorized in its charter to exercise.

Moreover, in this case the statute in question and the subsequent amendatory statutes clearly show that it was contemplated by the legislature that the railroad might not build some of the lines in question and that the contractual provision as to taxation would apply to those built.

Moreover, the legislature of Georgia acquiesced in the change of plans to build the road to Atlanta to connect with the road being built by the State, rather than to Eatonton as originally planned, and in fact withdrew the right to build the road to Eatonton.

A full discussion of these questions would extend this brief to unreasonable lengths and is more appropriate in an argument on the merits than on summary motion to dismiss or affirm.

Ground No. 5 of his motion, on the grounds that a contractual provision as to taxation in the charter of a railroad is contrary to the Fourteenth Amendment, if sustained, would require a reversal of scores of decisions of this Court upholding such provision. Certainly it is not so plain as not to require argument

that all of such decisions of this Court should be overruled, although never previously questioned by this Court on the grounds suggested by appellee.

Appellee Concluded by Prior Decree.

Finally, as pointed out above and in the Assignments of Error and in our original Statement as to Jurisdiction, the previous decree enjoining the predecessor in office of appellee, in an action defended by the duly authorized representatives of the State, is res judicata. Appellant respectfully submits that this question also is substantial and requires argument and consideration of the Court on its merits.

Respectfully submitted,

ROBERT B. TROUTMAN
FURMAN SMITH

Counsel for Appellant

Spalding, Sibley, Troutman & Kelley 434 Trust Company of Georgia Building Atlanta, Georgia

Of Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1000 / 750 1951

No. 454 X

GEORGIA RAILROAD & BANKING CO.,
Appellant.

vs.

CHARLES D. REDWINE, STATE REVENUE COMMISSIONER

APPEAL FROM THE UNITED STATES DESCRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

STATEMENT AS TO JURISDICTION

ROBERT B. TROUTMAN,
FURMAN SMITH,
Counsel for Appellant.

SPALDING, SIBLEY, TROUTMAN & KELLEY,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 454

GEORGIA RAILROAD & BANKING CO.,

228

CHARLES D. REDWINE, STATE REVENUE COMMISSIONER

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

STATEMENT AS TO THE JURISDICTION OF THE UNITED STATES SUPREME COURT

As provided in Rule 12 of the Rules of the Supreme Court of the United States, appellant, Georgia Railroad & Banking Company, submits herewith its statement disclosing the basis upon which it is contended that the Supreme Court has jurisdiction upon appeal to review the judgment in question.

(a) Statutory Provision Believed to Sustain Jurisdiction

Jurisdiction of the Supreme Court is sustained by Sec. 1253 of the Judicial Code (28 U. S. C. 1253).

The action in the District Court was an action for injunction required by Act of Congress to be heard and determined by a District Court of three judges and was in fact heard and determined by a District Court of three judges.

(b) Statutes of the State of Georgia, Validity of Which Is Involved

The statutes of the State of Georgia, validity of which is involved, are:

(1) Article I, Sec. 3, par. 3 of the Constitution of Georgia, adopted by amendment in 1945, as appears in Georgia Laws 1945, page 14, as follows:

"All exemptions from taxation heretofore granted in corporate charters are declared to be henceforth null and void."

(2) Chapters 92-61, 92-26, 92-27, 92-28 of the Georgia Code of 1933, and the Act approved January 18, 1938, set out in the Georgia Laws, Extra Session, 1937-1938, page 77 et seq., as amended by the Act approved 2-17-43, set out in Georgia Laws 1943, page 204 et seq., providing for the ad valorem taxation of railroad corporations. Said statutes provide in substance that all railroad corporations owning property in the State of Georgia shall be required to make return of said property to the Commissioner of Revenue for the purposes of ad valorem taxation, that said return shall show separately the value of such property located in each county, municipality and school district through which such railroad runs, that the governing authorities of such counties and municipalities shall certify to the Revenue Commissioner the rate of taxation applicable to such property, that the State Revenue Commissioner shall thereupon assess all of the property for state taxation at the rate fixed by the legislature and shall assess the property in each county, municipality and school district at the rate so certified, that the railroad shall thereupon pay to the State Revenue Commissioner the state tax

and pay to the proper authorities of each county and municipality the amount due to such county, municipality or school district, that if the railroad fails to pay any such tax the State Revenue Commissioner shall issue execution requiring the levying officer to levy upon and sell a sufficient amount of the property of the railroad and that if any such railroad fails to return its property the State Revenue Commissioner shall assess the same from the best information he can obtain.

Appellant contends that said constitution and statutes are, as against appellant, unconstitutional and void on the grounds that the same are contrary to Sec. 10 of Article I of the Constitution of the United States and contrary to the Fourteenth Amendment of the Constitution of the United States.

(c) Date of Judgment Sought to Be Reviewed and of Application for Appeal

The judgment dismissing the complaint for want of jurisdiction was entered August 10, 1949. Motion for rehearing and to alter and set aside said judgment was filed by appellant on August 19, 1949. By order entered October 3, 1949, the prior opinion was modified and the motion overruled. The petition for appeal was presented, and was allowed, October 6th, 1949.

(d) Statement Showing Jurisdiction

Appellant was chartered by special act of the legislature of Georgia approved December 21, 1833 (Georgia Laws, 1833, page 256 et seq.). Said Act provided:

"The stock of said company and its branches shall be exempt from taxation for and during the term of seven years from and after completion of said railroads or any one of them; and after that shall be subject to tax not exceeding one-half percent per annum on the net proceeds of their investment."

In 1874 the legislature of Georgia passed an act levying ad valorem taxes on railroads. Appellant resisted the tax. The Supreme Court of Georgia, in State of Georgia v. Georgia Railroad & Banking Co., 54 Ga. 423, held that the above provision was an irrevocable contract exempting the property of the railroad from tax except as provided therein and that the Act of 1874, as applied against appellant, was unconstitutional and void as impairing the obligation of that contract.

No further effort was made to tax the property of the railroad until 1902 when the State of Georgia, acting through its Comptroller General again attempted to levy a tax on the property of appellant. Appellant then brought the suit in equity in the Circuit Court for the Northern District of Georgia against William A. Wright, Comptroller General of Georgia.

That action was defended by the Attorney General of Georgia with the approval and direction of the Governor. The Attorney General not only resisted the injunction but affirmatively asked the court to consider and decide the questions involved in order that the defendant as an official of the State of Georgia might know and perform his official duty.

The Court, after hearing, held that the charter provision was an irrevocable contract preventing the faxation of the property of the railroad except as therein provided and entered a decree permanently enjoining the defendant from levying and collecting any tax against the property described in the decree except as provided in the charter.

Georgia Railroad & Banking Co. v. Wright, 132 Fed. 912.

That decree was appealed to the Supreme Court. The Supreme Court modified the decree by striking therefrom certain property, which had been acquired by the railroad in a subsequent merger and affirmed the decree as so modified (Wright v. Georgia Railroad & Banking Co., 216 U. S. 420).

Thereafter, no effort was made to tax the railroad until 1945. At that time the State of Georgia adopted an amendment to its constitution providing:

"All exemptions from taxation heretofore granted in corporate charters are declared to be henceforth null and void.".

Acting under authority of that section, appellee, State Revenue Commissioner, threatened to levy and collect taxes against the property of appellant railroad from 1937 to date. Appellant thereupon brought this proceeding in the District Court, to temporarily and permanently enjoin appellee, as a wrongdoer, from levying and collecting any taxes on the property of appellant contrary to the provision in its charter, on the grounds that the above quoted provision of the Constitution of Georgia, and the statutes of Georgia under which appellee purported to be acting, were unconstitutional and void in that they sought to impair the obligation of the contract contrary to Sec. 10 of Article I of the Constitution of the United States, and were contrary to the Fourteenth Amendment to the Constitution, and to carry out and enforce the prior decree of Court, as modified and affirmed by the Supreme Court.

A three-judge court was convened as provided in Sec. 2281 and Sec. 2284 of the Judicial Code. Defendant filed motion to dismiss. Plaintiff filed motion for judgment on the pleadings, or for summary judgment, or in the alternative for an interlocutory injunction. The three-judge court,

after argument, sustained the motion to dismiss and dismissed the petition on the ground that the action was against the State of Georgia within the prohibition of the 11th Amendment of the Constitution of the United States.

(e) Authorities Believed to Sustain Jurisdiction

Appellant believes that jurisdiction of the Supreme Court of this appeal is sustained by the following authorities:

28 U. S. C. 1253;

28 U. S. C. 2281;

28 U. S. C. 2284;

Query v. United States, 316 U. S. 486;

. City of Cleveland v. United States, 323 U.S. 329;

Stirling v. Constantin, 287 U. S. 378;

Stratton v. St. Louis Southwestern Ry. Co., 282 U. S.

10.

Sec. 1253 of the Judicial Code provides for direct appeal to the Supreme Court in actions required to be heard and, determined by a District Court of three judges.

Sec. 2281 requires this action, brought to restrain the State Revenue Commissioner of Georgia from assessing and collecting a tax on the ground that the Constitution of Georgia and the statutes of Georgia under which he is purporting to act are contrary to the Constitution of the United States, to be heard and determined by a three-judge court. Sec. 2284 (5) specifically provides that an order dismissing the application for injunction must be entered by three judges. The Supreme Court so held in the case of Stratton v. St. Louis Southwestern Railroad Co., 282 U. S. 10.

Authorities Showing Question Substantial

(1) Action was not a suit against the State within the prohibition of the Eleventh Amendment.

Gunter v. Atlantic Coast Line, 200 U. S. 273. Allen v. B. & O. Railroad, 114 U. S. 311.

Board of Liquidation v. McComb, 92 U. S. 531. Looney v. Crane Co., 245 U. S. 178.

(2) Defendant was bound by prior decree. Gunter v. Atlantic Coast Line, 200. U. S. 273.

Deposit Bank v. Frankfort, 191 U. S. 499. Sunshine Coal Co. v. Adkins, 310 U. S. 381.

This is true, even if the State was not a party, because the State defended the prior action.

· Souffront v. Campagne des Sucreries, 217 U. S. 475. Drummond v. United States, 324 U. S. 316. United States v. Candelaria, 217, U. S. 432.

(3) Court had ancillary jurisdiction to enforce prior decree.

Gunter v. Atlantic Coast Line, 200 U. S. 273.

(4) Even without the prior decree, defendant should have been enjoined.

Wright v. Georgia Railroad & Banking Co., 216 U. S. 420.

> ROBERT B. TROUTMAN, FURMAN SMITH.

Counsel for Appellant.

SPALDING, SIBLEY, TROUTMAN & KELLEY,

Of Counsel.

APPENDIX "A"

Opinion Dismissing Complaint for Want of Jurisdiction

This suit is another phase of litigation, which has been presented to the courts by various proceedings, in various forms, for more than seventy years. Past litigation, and the present, centers around an exemption granted to the present complainant by an Act of the Georgia Legislature in 1833. Full reference to the facts and the questions ultimately involved need not be stated here except by reference to phases of the former litigation which are directly in-& Volved here, to-wit: State of Georgia v. Georgia Railroad & Banking Company, 54 Ga. 423; Georgia Railroad & Banking Company v. Wright, 132 F. 912; Wright v. Georgia Railroad & Banking Company, 216 U. S. 420; Georgia Railroad & Banking Company v. Musgrove, 204 Ga. 139, 49 S. R. 2d 26.

In the present proceeding the complainant proceeds against Charles D. Redwine, State Revenue Commissioner of Georgia, to enjoin the assessment and collection of ad valorem taxes which is alleged would be contrary to the provisions of complainant's legislative charter, and thus impair the obligation of the contract. The complainant also seeks to enforce against Redwine, Revenue Commissioner, a previous decree of this Court entered in the case of Georgia Railroad and Banking Company vs. William A. Wright, Comptroller General, in 1907. 132 F. 912 (supra).

The defendant has filed a motion to dismiss, presenting various questions, the one now primarily for determination asserting that the present suit is in effect one against the State of Georgia, and of which this Court has no jurisdiction because of the provisions of the 11th Amendment to the . Constitution of the United States.

Complainant has moved for a judgment on the pleadings and for a summary judgment, and seeks to meet the attack of the defendant's motion upon the ground, principally, that as the result of participation by the Attorney General of Georgia in the former proceeding of 1907 the State waived its immunity from suit, and further, that the suit against

the public officer to restrain the enforcement of an unconstitutional Act is not a suit against the State within the provisions of the 11th Amendment:

It seems proper to first consider the effect of the former adjudication of this Court in its decree of 1907 which restrained the defendant from assessing or collecting any taxes contrary to the terms of that decree. If bound thereby, the effect of the decree would require that the threatened assessment and collection of taxes by the defendant be likewise now restrained. That proceeding adjudged the validity of the exemption now involved.

This former suit was between the present complainant, a corporation created under the laws of the State of Georgia, and "William A. Wright, a citizen of the State of Georgia." The defendant was represented by counsel who was the Attorney General of Georgia. He acknowledged service of the subpoena "William A. Wright, by John C. Hart, Attorney at Law and Attorney General for Georgia." However, the pleadings were signed merely by the named counsel as "Counsel for defendant" and the pleadings for the defendant were entered in the name of William A. Wright" as an individual. However, the opinion of the Court designates the defendant as "William A. Wright, Comptroller General of the State of Georgia." These references have been made to show that there is no clear course of designation or conduct which would lead to the conclusion without doubt that the respective parties considered the suit one against Wright in his official capacity and as a representative of the State, or whether he was proceeded against as an individual, to restrain an illegal act threatened to be consummated under color of office.

Without regard, however, to whether the defendant was sued in his individual or official capacity, it is conceded that he was the official of the State charged with the assessment and collection of the taxes in question and, counsel for the complainant, relying upon the principle ruled in Gunter v. Atlantic Coast Line RR Co., 200 U. S. 273, contends that the State in that proceeding waived its immunity from suit by participation in behalf of the defendant by the Attorney General of Georgia, and the tacit adoption of the litigation by a subsequent Governor in his message to the Legis-

lature. To ascertain the validity of this contention it becomes necessary to determine the power of the Attorney General of Georgia, and perhaps of the Governor of the State also, to waive the immunity of the State from suit by participating in, or the utterance of statements concerning, litigation against a State officer which seeks to control his official acts. It is of course established that the State's waiver of immunity from suit, or its consent to suit, must be expressed by a statute. It becomes necessary then to consider the statutes of the State of Georgia.

The provisions of the statutes in effect at the time of the former suit, which more clearly than any other expresses the power of the Governor or Attorney General to consent to suit, are sections 23 and 220 of the Georgia Code of 1895,

which provide:

Sec. 23. "When any Suit is instituted against the State, or against any person, in the result of which the State has any interest under pretense of any claim inconsistent with its sovereignty, jurisdiction or rights, the Governor shall, in his discretion, provide for the defense of such suit, unless otherwise specially provided for."

Sec. 220. "It shall be the duty of the Attorney-General . . to represent the State . . . in all civil and criminal cases in any court when required by the Governor."

As to suits against the Comptroller General, this officer was authorized "when the services of a Solicitor-General are necessary in collecting or securing any claim of the State in any part of the State, . . . to command the services of said Attorney-General in any and all of such

It will be observed that this statute has reference to "collecting or securing any claim of the State," and not broadly to defense of suits against the Comptroller

It may be noted that these are mere general directions for legal representation and do not form specifically a part of the tax collecting machinery provided by the Georgia statutes as were the South Carolina statutes considered in the case of Gunter vs. Atlantic Coast Line RR Co., 200 U. S. 273. The construction of his powers and authority by the Attorney General, made without regard to pending litigation, throws some light, at least, upon the question. In an address on the "History, Powers and Duties of the Attorney General" by Honorable M. J. Yeomans, then Attorney General of Georgia, Report of the Georgia Bar Association 1937, in stating the things that the Attorney General of the State "hay not do," among others, he said:

"1. He cannot consent for the state to be sued. I have been requested, on several occasions, to consent to a suit being brought against the State. The Attorney General has no such authority. Neither has any other State officer. A consent on the part of the State to be sued must be found in some legislative enactment."

To complete the picture, it should be stated that in his message to the legislature in 1908, then dovernor Smith, but who was not Governor at the time the suit was instituted in 1904, considered the litigation as "between the State and the Georgia Railroad and Banking Company," It may be that the proceeding was considered by the para ties, counsel, the Court and, while on appeal, by the Governor, as one against the State. Nevertheless, the State, as a Sovereign, when the point is properly presented and relied upon, has the right to attack the attempted waiver of sovereignty, or consent to suit, by officers not plainly authorized by statute to so subject the State . suit. In . Ford Company vs. Department of the Treasury, 323 U. S. 459, 467, 468, 469, there is a clear holding to this effect. Indeed this proposition does not involve a mere matter of parties or privies, but goes directly to the right of the Sovereign to immunity from suit except where it has clearly consented thereto as a Sovereign. Strict enforcement of the rule is essential to prevent this essential attribute from being frittered away by assumed or even pretended waiver of the State's immunity from suit by officers not authorized to do so. The only safe rule in such an instance will appear to be that the only proper basis for declaring consent or establishing waiver must be

found clearly expressed in some constitutional or statutory provision directly relating to the subject matter involved. This is the basis of the holding in Gunter, vs. Atlantic Coast Line Railroad, supra, which is confidently relied upon by the complainant in the present case. That decision, as appears therefrom, and from the construction given to it in two recent cases, Great Northern Ins. Co. vs. Read, 322 U. S. 47, 56, and Ford Company vs. Department of the Treasury, 323 U.S. 459, supra, is predicated upon the South Carolina statutes, which had reference to an action for the collection of the taxes then involved, and provided that the Attorney General "shall defend said action for and on behalf of the State." The marked difference between the statutes of the State of Georgia and the South Carolina statute just referred to, renders clearly inapplicable the decision in the Gunter case. In view of the provisions of the Georgia statute, and the primacy of sovereign immunity from suit now asserted, the language of the Supreme Court as to the waiver by individuals of constitutional rights seems apposite, that is that "Courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights." Johnson vs. Zerbst, 304 U. S. 464, citing Aetna Insurance Company vs. Kennedy, 301 U. S. 389, 393; Hodges vs. Easton, 106 U. S. 408, 412; Ohio Bell Telephone Co. vs. Public Utilities Commission, 301 U.S. 292, 307. See also, Glasser vs. U. S., 315 U. S. 60, 70.

It is true, as argued by the complainant, that following the decision in the Wright case in this Court, affirmed by the Supreme Court of the United States, no State officer for many years made any attempt to assess the charter lines of the defendant for all valorem taxes. The decision in Gunter vs. Atlantic Coast Line Railroad, supra, gives some weight to this feature, and of course "Administrative construction by a state of its statutes of consent," is entitled to weight. Ford Company vs. Department of the Treasury, supra. The conclusive effect of such official inaction, however, is seriously undermined if not destroyed, by the action of the present complainant in instituting in the State Court in 1945 a proceeding against the State

Revenue Commissioner of the State of Georgia, first naming him defendant "in his representative capacity," but afterwards amending it to read as against the named individual "who is State Revenue Commissioner of the State of Georgia," and which was afterwards amended to substitute as a party his successors in office as State Revenue Commissioner, as defendants. In that proceeding, the 1907 decree of this Court was submitted as res adjudicata, as was also the decision of the Supreme Court of Georgia in State of Georgia vs. Georgia Railroad and Banking Company, 54 Ga. 423. In that proceeding the question was squarely presented by demurrer that the suit was ."in reality a suit against the State of Georgia and the State of Georgia has not consented to be made a party to this action or for the action to proceed against it." The trial court overruled this demurrer, but its judgment was reversed by the Supreme Court with directions that the same be sustained, and the petition dismissed because patently a proceeding against the State without its consent. Musgrove vs. Georgia Railroad & Banking Company, 204 Ga. 139, 49 S. E. 2d 26. Appeal to the Supreme Court of the United States was dismissed: Georgia Railroad & Banking Company vs. Musgrove, 335 U./S. 900. The Supreme Court of Georgia expressly referred to the former litigation in this Court and directed attention to the fact that in that case the question of the State's consent to suit was not raised. The Gunter Case, supra, was cited in the decision and the Supreme Court of Georgia plainly did not consider the law of Georgia to be to the same effect as that of South Carolina there considered. The question of waiver and the construction of the effect of the former decree was directly presented, for a copy of the entire record of the Wright case in this Court and in the Supreme Court of the United States was attached as a part of the petition in support of the plea of res adjudicata and as an estoppel. This holding by the highest Court of the State of Georgia upon the identical issues now sought to be presented, that the proceeding was one against the State and therefore not maintainable without the State's consent, is more than an "administrative construction." and is a holding by every fair implication that the Georgia

statutes did not provide authority for the officers participating in the former litigation to waive the State's immunity from suit or evidence its consent. In these circumstances, the admitted inaction of the State officials for a long period of time is entitled to no compelling force in determining the effect of the participation by the State officers in the former litigation.

The present defendant urges the decision in the Musgrove case, supra, as res adjudicata upon the principle stated in 50 Corpus Juris Secundum, page 15, section 597, as follows: "Although it has been said that, when a cause has been once fairly tried, it should not be tried again, even if the parties are willing, it is neverthele s a general rule that a party entitled to claim the benefit of a former judgment may waive or estop himself to assert such right. So, where a party . . . joins issue on the very questions settled by the judgment, or voluntarily opens an investigation of the matters which he might claim to be concluded by he will be held to have waived the benefit of the estoppel, and the case may be determined as though no such former judgment had been rendered." In this case we find it unnecessary to explore this principle to its fullest extent as an application of res adjudicata. It nevertheless seems to be pertinent in determining the effect to be given to the provisions of the Georgia statutes and the circumstances surrounding the former litigation in this Court, as well as the inaction of the State officers since the rendition of the decree therein.

It is concluded that no sufficient showing is made that in the original proceedings in this Court the State waived its immunity from suit or became bound by the decree. The question is therefore open, and being now asserted in bar-

of the present proceeding, it must be sustained.

The complainant contends that even if the State be not bound, it is nevertheless entitled to proceed by the present action as ancillary to the original suit against the defendant successor in office of William A. Wright, the Comptroller General of Georgia, defendant in the original suit. Under the law of Georgia defendant, Redwine, as the State Revenue Commissioner of the State of Georgia, is in effect the successor in office of the Comptroller Gen-

eral. However, this question is immaterial, for as well demonstrated in Musgrove vs. Georgia Railroad and Banking Company, supra, the suit is in substance and direct effect an action against the State, and not maintainable without its consent when the point is properly presented, as it now is. In view of the well considered opinion and discussion by Mr. Justice Bell in that case, no further discussion on this point is necessary here, except by reference. Complainant contends that the true holding of the Georgia Supreme Court in the case just mentioned is that a proceeding for declaratory judgment would not lie. Even if this were true, the opinion is nevertheless sound and controlling upon the points here involved, but it must be borne in mind that as clearly appears, that proceeding was also one for an injunction, and as to this feature, substantially identical with the present proceeding.

For the reasons just stated, it is clear that the effort to enforce the prior decree, as well as the relief sought by the ancillary proceedings are both proceedings against the

State, which are not permissible.

Complainant further contends that the 11th Amendment does not prohibit suits against a State official to enjoin the enforcement of a State tax law, or any other State law, contrary to the Constitution of the United States, and numerous authorities are cited in support of this contention. It of course must be conceded that in proper circumstances, and especially where there is involved no specific performance of a contract by the State, a suit against a State official to restrain illegal action, has been held not to be such a suit against the State as is prohibited by the 11th Amendment. It is not necessary to enter upon any ex-· tended discussion of the numerous adjudications which sustain the general proposition asserted by the complainant. There are adjudications which contain language, not disrectly controlling or involved in the case, to the effect that even where a contract of the State is involved, the assertion of restraint against the State official is not a suit against the State. However, none of these determines the particular point here involved, and that is, as clearly stated in In re Avers, 123 U.S. 443, 502, a ruling which has not been departed from, that "A bill in equity for the specific

performance of the contract against the State by name, it is admitted could not be brought. In Hagood v. Southern, 117 U. S. 52 it was decided that in such a bill, where the State was not nominally a party to the record, brought against its officers and agents, having no personal interest in the subject matter of the suit, and defending only as representing the State, where 'The things required by the decree to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State,' the court was without jurisdiction, because it was a suit against a State.

"The converse of that proposition must be equally true, because it is contained in it: that is, a bill, the object of which is by injunction, indirectly, to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, must also, necessarily, be a suit against the State. In such a case, though the State be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still, in substance, though not in form, a suit against the State." As clearly pointed out in the decision in that case, the point to be borne in mind in applying the principle of the authorities is that a suit predicated upon a contract with the State, (the one in the present case alleged to be prescribed by the complainant's charter), by enjoining the act of an officer and to indirectly compel the specific performance of the contract, "by forbidding all those acts and doings which constitute breaches of the contract, must be a suit against the State." The present suit is predicated upon the claim that the assessment and collection against its charter tax lines, as otherwise permitted by the statute, would constitute an impairment of the obligation of the contract so that the principle of the Avers case is inescapably applicable, because to grant the relief here sought will require the State to comply with and perform its contract of exemption. In fact, there is no claim of unconstitutionality in the statute under which the

idefendant threatens to proceed, but merely that because of the contract, such procedure would unconstitutionally impair the obligation of the contract. The State is the contracting party, and an injunction against its officer in this case would be merely an enforcement of the State's contract in a suit in which it has not consented to be sued. In re Ayers, supra, p. 503.

Therefore, the defendant official has in this case not merely urged the State's immunity as justification for his intended official acts,—he has established that the suit is

in fact against the State.

The Gunter case referred to above involved a charter exemption from taxation. Its language that a suit against . State officers to enjoin them from enforcing an unconstitutional tax was not a suit against the State within the prohibition of the 11th Amendment, was clearly not considered controlling upon the contract feature of the case, or else it would not have been necessary to determine what was considered the actual question involved, that is, whether the State had waived its immunity from suit. In the other adjudications cited by the complainant, there was either no express contract by the State involved, or this question was not considered controlling, or the point was not raised. So it may be stated that there is no opinion subsequent to the Ayers case, supra, which expressly, or by necessary implication, weakens its controlling effect.

Under our dual system of Government, recognition of the right and power of a State as a Sovereign, is of course essential and well understood. The importance of maintaining State sovereignty and immunity from suit in a proper case, as provided by the 11th Amendment, (the his tory of which need not be repeated here) is such that we have fully considered that question as here presented without regard to the ultimate merits of the contentions of the complainant as they are here, or may be hereafter, asserted when and if the State may itself move against the complainant in breach or avoidance of the contract of exemption from taxation provided in the complainant's charter. Thus, without any expression upon the ultimate merits of the case, but upon determination that the pro-

ceeding is in effect one against the State and prohibited by the 11th Amendment, we conclude that this Court is without jurisdiction of the present proceeding and that the motion of the defendant now urged in effect on behalf of the State, should be, and the same hereby is, sustained.

The complaint accordingly is dismissed for want of juris-

diction in this Court to entertain the same.

This the 29th day of July 1949.

19 Leon McCord, United States Circuit Judge; Robert L. Russell, United States District Judge.

Filed Aug. 10, 1949.

APPENDIX "B"

Dissenting Opinion

I respectfully dissent from the majority opinion in this case.

There is no necessity for my giving a lengthy statement of the facts in this case. Suffice to say that the State of Georgia for over seventy years has, by various procedures and various forms, been trying to vitiate or nullify this contract in question which is the basis of this suit under consideration. (City of Augusta Vs Georgia Railroad & Banking Company, 26 Georgia, 651, 662, et seq.; The State of Georgia Vs Georgia Railroad & Banking Company, 54 Georgia, 423; Goldsmith, Comptreller Sc., Vs Georgia Railroad & Banking Company, 62 Georgia; 485.)

Judge Newman of this court (Northern District of Georgia), on the 3rd day of July, 1907, decided the contract at issue between the State of Georgia, acting by and through its Legislature and Governor and The Georgia Railroad & Banking Company was a valid and binding contract. Judge Newman's decision was affirmed by the Supreme Court of the United States in the case of Wright, Comptroller, Vs The Georgia Railroad & Banking Com-

pany, U. S. Supreme Court 216, page 420.

The plaintiff in this case. The Georgia Railroad & Banking Company has filed a motion for judgment on the pleadings or for summary judgment. The defendant has filed a motion to dismiss. The majority of this court has decided to sustain the motion to dismiss for reasons as set forth in their decision. I am deciding in favor of a judgment on the pleadings or summary judgment as follows:

I believe this Court has jurisdiction because this action is an ancillary or supplemental bill to effectuate or enforce a prior decree of this court as hereinabove stated. (See also Root Vs Woolworth, 150 U. S. 201. Gunter Vs Atlantic Coast Line Railroad, 200 U. S. 273.) The State of Georgia is therefore before this court by reason of these decisions. Being before this court this action is merely, as stated above, simply an action to effectuate the prior decree of this court

I do not believe the case of Musgrove Vs The Georgia Railroad Banking Company, 49 S. E. 2d 26, cited by The State of Georgia and the majority of this court is applicable to this case, because that case merely decided the question of state practice and did not decide this particular federal question, or any other federal question.

The judgment of this court as affirmed by the Supreme Court of the United States is conclusive on the validity and effect of the contract of exemption not only as against the contentions actually urged in that case but as against all contentions that could have been urged. (See Gunter Vs Atlantic Coast Line, 200 U. S. 273; Deposit Bank Vs Frankfort, 191 U. S. 499; New Orleans Vs Citizens Bank, 167 U. S. 371; Montgomers Vs The

167 U. S. 371; Montgomery Vs Thomas (C. C. A. 5), 146 F. (2d) 76; Leininger Vs Commissioner (C. C. A. 6), 86 F. (2d) 79f.

Respectfully,

F. M. SCARLETT,
U. S. District Judge,
for the Southern District of Georgia.

July 29, 1949.

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JAN 23 1950

IN THE

Supreme Court of The United States

October Term, 1951

GEORGIA RAILROAD & BANKING CO.,
Appellant

CHARLES D. REDWINE, State Revenue Commissioner,
Appellee

BRIEF FOR APPELLANT

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IN THE

Supreme Court of The United States

October Term, 1949

NO. 454

GEORGIA RAILROAD & BANKING CO., Appellant

VS.

CHARLES D. REDWINE, State Revenue Commissioner,

Appellee

BRIEF FOR APPELLANT

OPINION OF COURT BELOW

The opinion of the District Court is reported in 85 Federal Supplement 749.

JURISDICTION OF THE SUPREME COURT

The jurisdiction of the Supreme Court is invoked under Title 28, U. S. Code, Sec. 1253, which provides for direct appeal to the Supreme Court from any action required to be heard and determined by a District Court of three judges. The action is to enjoin the State Revenue Commissioner from collecting a tax from appellant on the grounds that the state statute under which such a tax is imposed is contrary to the Constitution of the United States. Such action is required, by Title 28 U. S. Code, Sec. 2281, to be heard and determined by a District Court of three judges, and was in fact heard and determined by a District Court of three judges. Probable jurisdiction was noted Dec. 5, 1949 (R. 195).

STATEMENT OF THE CASE

The Charter Contract.

Appellant was chartered by special act of the legislature of Georgia approved December 21, 1833 (Georgia Laws, 1833, page 256 et seq. app. i). Said Act provided:

"The stock of said company and its branches shall be exempt from taxation for and during the term of seven years from and after completion of said railroads or any one of them; and after that shall be subject to tax not exceeding one-half percent per annum on the net proceeds of their investment." (app. vi)

Prior litigation.

In 1874 the legislature of Georgia passed an act levying ad valorem taxes on railroads. Appellant resisted the tax. The Supreme Court of Georgia, in State of Georgia v. Georgia Railroad & Banking Co., 54 Ga. 423, held that the above provision was an irrevocable contract exempting the property of the railroad from tax except as provided therein, and that the Act of 1874, as applied against appellant, was unconstitutional and void as impairing the obligation of that contract, contrary to Art. I, Section 10, of the Constitution of the United States.

No further effort was made to tax the property of the rail-road until 1902 when the State of Georgia, acting through its Comptroller General, again attempted to levy a tax on the property of appellant. Appellant then brought suit in equity in the Circuit Court for the Northern District of Georgia against William A. Wright, Comptroller General of Georgia.

That action was defended by the Attorney General of Georgia with the approval and direction of the Governor. The Attorney General not only fesisted the injunction but affirmatively asked the court to consider and decide the questions involved in order that the defendant as an official of the State of Georgia might know and perform his official duty. (R. 79, 83)

The Court, after hearing, held that the charter provision was an irrevocable contract preventing the taxation of the property of Appellant except as therein provided and entered a decree permanently enjoining the defendant from levying and collecting any tax against the property described in the decree except as provided in the charter (R. 84).

Georgia Railroad & Banking Co. v. Wright, 132 Fed. 912.

On appeal, this Court modified the decree by striking therefrom certain property which had been acquired by the railroad in a subsequent merger and affirmed the decree as so modified. (R. 131)

Wright v. Georgia Railroad & Banking Co., 216 U. S. 420.

The state then attempted to levy a tax against the property in the hands of the lessees. That attempt was also enjoined; and this Court, on appeal, affirmed.

Wright v. Louisville & Nashville Railroad Co., 236 U. S. 687.

Present proceedings.

Thereafter, no effort was made to tax the railroad until 1945. At that time the State of Georgia adopted an amendment to its constitution providing:

"All exemptions from taxation heretofore granted in corporate charters are declared to be henceforth null and void."

(App. xxxiv)

Acting under authority of that section, appellee, State Revenue Commissioner threatened to levy and collect taxes against the property of Appellant from 1939 to date. Appellant thereupon brought this proceeding in the District Court to temporarily and permanently enjoin appellee, as a wrongdoer, from levying and collecting any taxes on the property of appellant contrary to the provision in its charter, on the grounds

that the above quoted provision of the Constitution of Georgia, and the statutes of Georgia under which appellee purported to be acting, were unconstitutional and void in that they sought to impair the obligation of the contract contrary to Sec. 10 of Article I of the Constitution of the United States, and were contrary to the Fourteenth Amendment to the Constitution. Appellant further prayed that the prior decree and permanent injunction of that Court, as modified and affirmed by this Court, be carried out and enforced. (R. 1)

A three-judge court was convened as provided in Sec. 2281 and Sec. 2284 of the Judicial Code. Defendant filed motion to dismiss. (R. 9, 15) Plaintiff filed motion for judgment on the pleadings, or for summary judgment; or in the alternative for an interlocutory injunction. (R. 161)

Judgment of District Court.

The three-judge court, after argument, sustained the motion to dismiss on the ground that the action was against the State of Georgia, within the prohibition of the 11th Amendment of the Constitution of the United States. (R. 170) One Judge dissented on the grounds that the Court had jurisdiction to enforce its prior degree and that all questions presented were precluded by the prior decree. (R. 180)

SPECIFICATION OF ERRORS

The court below erred in dismissing the petition, and in not entering a summary judgment or a judgment on the pleadings in favor of appellant, for the reasons that (a) the action was not against the state, (b) the court had furisdiction to enforce its prior final decree and permanent injunction affirmed by this Court, (c) appellee was concluded by the prior final decree affirmed by this Court, (d) the taxes sought to be collected and the statutes under which they were imposed are contrary to Sec. 10 of Article I of the Constitution of the United States in that they would impair the obligation of the contract, and (e) the dismissal of the complaint, unless reversed, will result

in appellant's being deprived of its property without any opportunity for a hearing and without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, as is more fully set out in the assignments of error 1 through 9 (R. 191).

SUMMARY OF ARGUMENT

An action to enjoin the collection of a state tax on the grounds that the law of the state under which the tax is levied is contrary to the Constitution of the United States is not an action against the state within the meaning of he Eleventh Amendment. This Court has repeatedly so held. This court has so held in the precise situation here presented, that is, in an action to enjoin the tax on the grounds that the law levying the tax impairs a contract of the state contrary to the Constitution of the United States.

If this action were against the state, then the prior action would have been equally against the state, for both are in the same form and pray the same relief. If so, Appellee is bound by the existing permanent injunction, affirmed by this Court; and the District Court has jurisdiction to enforce its injunction against Appellee. A state and its officials cannot violate or ignore the permanent injunction of a Federal Court on the grounds that they might have pleaded the immunity of the State to suit in the proceeding in which the injunction was issued. Immunity from suit is a personal privilege which may be waived, and is waived by litigating the matter to final decree without objection. The final decree adjudicates that the court had jurisidtcoin, just as it adjudicates every other question necessary to the rendition of the decree.

Even though the prior action was not against the state, Appellee is bound by the prior decree because the state, through its duly authorized officer, not only defended the prior action but affirmatively asked the court to take jurisdiction and decide the question in order that the state officials might know their duty and the state might receive the taxes due it. A person not

a party to an action who employs counsel and undertakes the defense is bound by the decree as fully and to the same extent as if he were a party. This principle applies equally to the sovereign.

Appellee is bound by the prior decree not only in regard to she questions actually decided, but also as to all questions that could have been put in issue and decided.

Even if Appellee were not bound by the prior decree, the prior decision of this Court is right and should be followed.

Therefore, the District Court should have not only overruled the motion to dismiss, but should have granted Appellant's motion for assummary judgment or a judgment on the pleadings.

BRIEF OF LAW AND ARGUMENT

Action Is Not Against the State.

This Court has repeatedly held that an action to enjoin state officials from collecting a tax on the grounds that the tax is contrary to the Constitution of the United States is not an action against the state within the meaning of the eleventh amendment.

Looney v. Crane Co., 245 U. S. 178, and cases there cited

This Court has held specifically that the action is not against the state where the injunction is sought on the grounds that the threatened action would impair the obligation of a contract to which the state is a party.

Allen v. B & O Railroad, 114 U. S. 311.

Gunter v. Atlantic Coast Line R. R., 200 U. S. 273.

Board of Liquidation v. McComb, 92 U. S. 531. This Court has in many other cases affirmed injunctions against state officials enjoining them from collecting taxes from a railroad company on the grounds that such action would impair a contract of exemption entered into by the state, both the parties and the court considering the question too well settled to require discussion.

Wright v. Georgia Railroad & Banking Co., 216 U. S. 420.

Wright v. L & N Railroad,
236 U. S. 687.

Wright v. Central of Georgia Railroad, 236 U. S. 674.

Powers v. Detroit & Grand Haven Railway, 201 U. S. 543.

> Wright v. Sills, 2 Black 544.

Humphrey v. Pegues, 16 Wall 244

omlinson v. Branch,
15 Wall 460.

Dodge v. Woolsey, 18 Howard 331.

This Court has recently, in Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, reviewed the cases and restated the rule in regard to suits against the sovereign (p. 689):

"... where the officers' powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do. Or he is doing it in a way which the sovereign has forbidden. His actions are ultra vires his authority and, therefore, may be made the object of specific relief . . .

"A second type of case is that in which the statute or order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional. Actions for habeas corpus against the warden and injunctions against the threatened enforcement of unconstitutional statutes are familiar examples of this type. Here, too, the conduct against which specific relief is sought is beyond the officer's power and is, therefore, not the conduct of the sovereign. The only difference is that in this case the power has been conferred in form but the grant is lacking in substance because of its constitutional invalidity.

"... The action of an officer of a sovereign (be it holding, taking of otherwise legally affecting the plaintiff's property) can be regarded as so 'illegal' as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory power or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void."

The rule laid down by this Court in the Larson case is well illustrated by a comparison of Allen v. B & O Railroad Co., 114 U. S. 311, and In re Ayers, 123 U. S. 443, both opinions written by the same Justice and involving the same contract.

In the Allen case the State of Virginia had issued bonds providing that coupons would be receivable in payment of all taxes. Subsequently the state attempted to repudiate its contract. The railroad had tendered coupons in payment of tax. Notwithstanding the tender, and in violation of the centract, the state official attempted to enforce the taxes. The railroad brought action in the federal court to enjoin the collection of the taxes. This Court held that the action was not against the state and that the injunction was properly granted.

In the Ayers case, the State of Virginia had passed a law directing the Attorney General to bring action in the State Court against taxpayers who had tendered the coupon in payment of taxes to recover such taxes and to require the taxpayers

in such cases to prove that the coupons were genuine and not spurious. The plaintiff in that case was a resident of England who had bought coupons for resale at a profit. No effort had been made to collect any taxes from him or to disturb his property in any way. He brought an action in the federal court, alleging that the action of the Attorney General made his coupons less desirable and depreciated their value, and praying that the Attorney General be enjoined from institution any action in the name of the State of Virginia and be required to dismiss such actions which he had already brought. Clearly that suit sought to control the action of the Attorney Generals in his official capacity and not as an individual acting beyond his authority. Bringing of dismissing an action in the name of the state was, of course, an official act within the scope of his authority, whether such actions were well founded or not. Indeed, he could not dismiss an action brought in the name of the state except in his official capacity as representative of the state. This Court, therefore, held that the action was in effect against the state and could not be maintained.

This action clearly falls within the ambit of the Allen, Gunter and similar cases. Appellant does not ask that appellee be required to do any act in his official capacity. It does not seek to impair or interferse with any funds or property of the state. It merely prays that appellee be enjoined from seizing the property of appellant under a state statute which is, as to appellant, clearly unconstitutional. Since the state statute purporting to authorize appellee to seize appellant's property is unconstitutional, appellee has not been validly authorized by the State of Georgia to seize appellant's property and appellee is, therefore, acting as an individual wrongdoer and not as a representative of the state in such threatened seizure.

14th Amendment Require Some Defensive Remedy.

Moreover, the 14th amendment to the Constitution of the United States imperatively requires that somewhere, sometime appellant be given a hearing on whether its property is subject assessment of a tax is action judicial in its nature, requiring for the legal exertion of the power such opportunity to appear and be heard as the circumstances of the case require" and "that due process of law requires that after such notice as may be appropriate, the taxpayer have opportunity to be heard as to the validity of the tax", and that if the state law does not otherwise grant a remedy for contesting the tax, the constitution requires that the taxpayer have the right to enjoin state taxing officials from assessing and collecting the tax.

Central of Georgia Railroad v. Wright, 207 U. S. 127.

> Turner v. Wade, 254 U. S. 64. Lipke v. Lederer,

259 U. S. 557. Regal Drug Corp. v. Waddell,

As pointed out more in detail later in this brief (page 33),

appellant does not have any remedy or opportunity for hearing under the law of Georgia. If the dismissal of this action is affirmed, appellant will be deprived of its property without any opportunity anywhere for a hearing on the legality of such seizure. As this Court held in the above cases, such procedure does not afford due process of law, and should be enjoined on that ground alone.

Court Can Enforce Its Own Final Decree and Injunction.

(a) If prior action was against state.

Moreover, if this action is against the state, the prior final decree and permanent injunction, affirmed by this Court, is equally against the State; and the court has ancillary jurisdiction to enforce that injunction.

A state cannot participate in litigation, taking its chances of winning, and then after final decree, affirmed by this Court, ignore the permanent injunction on the ground that the action was against the state. That is particularly true where, as here, the state, through its duly authorized officers, not only defended the action but affirmatively asked the court to take jurisdiction and decide all of the questions presented in order that the state officials might know and enforce their duty and in order that the state might collect taxes legally owing to it. Immunity from suit is a personal privilege which may be waived, and is waived, by such conduct.

Gunter v. Atlantic Coast Line, 200 U. S. 273.

Gardner v. New Jersey, 329 U. S. 565.

> Clark v. Barnard, 108 U.S. 436.

The final decree of a federal court conclusively adjudicates that the court has jurisdiction, just as it concludes every other question necessary to the decree, even though the lack of jurisdiction appears on the face of the record.

Chicot County Drainage District v. Bacter State Bank,
308 U. S. 371.

Dowell v. Applegate, 152 U. S. 327.

Thompson v. Continental Gin Co., 73 Ga. App. 694.

The District Court in this respect was utterly inconsistent. It held that this action could not proceed because it was against the State of Georgia. At the same time, it held that the state was not bound by the prior final decree and permanent injunction because that action, in the same form as this, was against Wright in his individual capacity and not against the State of Georgia.

(b) If prior action not originally against state.

Moreover, as this Court specifically held in the Gunter case (200 U. S. 273), a state and its subsequent subordinate officials may be bound and concluded by a judgment against a state official, and the court has ancillary jurisdiction to enforce such judgment against such subsequent officials, even though the prior action was originally against the official in his individual capacity, if the state through its duly authorized officials undertook the defense of the prior action.

Gunter v. Atlantic Coast Line Railrodd, 200 U. S. 273.

In that case a stockholder of the railroad had previously brought suigin the federal court to enjoin a County Treasurer from collecting tax from the railroad on the ground that the property was exempt from tax under a contractual exemption in its charter. The Attorney General of South Carolina, as authorized by South Carolina law, undertook the defense of the suit. A final decree and injunction was entered. Some thirty years later the State of South Carolina passed a law requiring the property to be taxed and directing the Attorney General to bring action to enforce the tax. The railroad then filed ancillary proceedings in the same cause asking the court to enforce its prior decree by restraining the Attorney General from prosecuting the action. The court did enjoin the Attorney General and this Court affirmed, holding: (1) that since the state, through its duly authorized officer, had undertaken the defense of the prior action, it and its subsequent subordinate officials were bound by the prior decree and injunction; (2) that the District Court, therefore, had ancillary jurisdiction to enforce that decree and injunction against the state and against all subsequent officials of the state, and (3) that the prior decree conclusively adjudicated that the contract of exemption was valid, not only as against all objections there urged, but as against all objections that could have been there

This is but an application of the settled principle that a

judgment is binding not only as against parties to the record but also against any person interested who employs counsel or otherwise openly defends the action.

"One who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly to the knowledge of the opposing party, is as much bound by the judgment and as fully entitled to avail himself of it as an estoppel against the adverse party as he would be if he had been a party to the record."

*Souffront v. Campagne des Secreries, 217 U. S. 475, 487.

This principle is equally as applicable to the sovereign.

"If the United States in fact employs counsel to represent interest in a litigation or otherwise actively aids in its conduct, it is properly enough deemed to be a party and not a stranger to the litigation and bound by its result."

Drummond v. United States, 324 U. S. 316, 318.

The District Court in its opinion distinguishes the Gunter case on the grounds that the Attorney General of Georgia was not authorized to represent Wright in the prior action or to file answers in his behalf, but exceeded his authority. This requires a consideration of the provisions of the laws of Georgia then in force. These are set out in the appendix, page xxxiv et seq.

The Code of 1895, then in force, provided:

"It is in the discretion of the Comptroller General to require the Attorney General, when the services of a Solicitor General are necessary in collecting or securing any claim of the State, in any part of the State; either to command the

services of said Attorney General in any and all such cases, or the Solicitor Generals in their respective circuits."

Sec. 222, Code of 1895.

"It shall be the duty of the Attorney General . . . to represent the State . . . in all civil and criminal cases in any court when required by the Governor."

Sec. 220, Code of 1895.

"When any suit is instituted against the State or against any person, in the result of which the State has an interest under pretense of any claim inconsistent with its sovereignty, jurisdiction or right, the Governor shall, in his discretion, provide for the defense of such suit unless otherwise specially rovided for."

Sec. 23, Code of 1895.

Sec. 222 quoted above clearly authorized the Comptroller General to call on the Attorney General in any case where his services were necessary in securing any claim of the State. Obviously the services of an attorney were necessary to secure the claims of the State in the prior litigation, and obviously the Comptroller General called on the Attorney General to defend the action, for the Attorney General, in his official capacity, acknowledged service (R. 41) and filed answers for the Comptroller General. (R. 75, 81)

His answer not only defends Wright personally, but affirmatively "prays the court, since it now has jurisdiction of this entire case, in ord that respondent may properly exercise his duties in the premises as Comptroller General, that this court will construe Section 15 of the charter of complaint, or so much thereof as relate to subject of taxation," (R. 80) and further" that said Section should be construed, and if found to protect any of the present property of complainant from proper taxation, defendant should be adjudged free to assess and tax such property and values as are not so protected from year to year under machinery as is by law provided." (R. 83)

Moreover, Sec. 23 quoted above made it the imperative duty of the Governor, when any suit was instituted against any person, in the results of which the State had an interest, to provide for the proper defense of such suit; and Sec. 220 made it the duty of the Attorney General to represent the State in any case in any court when required by the Governor. It was, therefore, the imperative duty of the Governor to see that the Attorney General defended that case on behalf of the State.

It will be presumed that the Governor did his duty and that the Attorney General, when he filed answer in his official capacity, was duly authorized to do so.

> Alexander v. State, 56 Ga. 479

And the Georgia Courts have held that when an action is defended by the Attorney General, the state in effect becomes a party.

Mayo v. Renfroe, 66 Ga. 408.

Hart v. Atlanta Terminal Co., 128 Ga. 754.

Trust Co. of Ga. v. Georgia, 109 Ga. 736.

In the Mayo case the plaintiff brought suit to enjoin the sheriff from collecting an execution issued by the Governor for money due the state. The action was defended by the Attorney General. The objection was made that the state or the Governor was an indispensable party. The court held that since the action was defended by the Attorney General, the state was in effect a party.

"Besides it is made his [the Governor's] duty to defend suits against any person where the state is interested. Code Sec. 22, 74; and this has been done in this case—the attorney general filed the demurrer for the sheriff, and the governor is in through his legal adviser and representative for all practical purposes, and in the only way in which he could well appear for the state."

> Mayo v. Renfroe, 66 Ga. 408, 427.

Moreover, while the files of both the Governor's office and of the Attorney General's office have been lost or destroyed and cannot now be found, it is obvious from the permanent records of the State of Georgia, of which this Court will take judicial notice, that both the Governor and the legislature of Georgia were fully informed of and approved the acts of the Attorney General in litigating the question on behalf of the state in the District Court and in this Court. For example, Governor Hoke Smith, in his message to the legislature of June 24, 1908, while the action was pending in this Court, Said:

"Litigation has been pending, off and on, for years between the State and the Georgia Railroad and Banking Company, growing out of a provision in its original charter upon the subject of taxation. There will probably be heard this Fall before the Supreme Court of the United States the case between that Company and the State, in which I hope a decision may be rendered which will define the State's right to collect taxes from it.

"The State says:

"First, that a correct construction of the original charter of the Georgia Railroad and Banking Company exempted only the stock of the Company from taxation.

"Second, that if this view is not sound, still the investment other than the original capital is subject to taxation. Success even to this extent would subject \$9,000,000 of property belonging to this Company to taxation.

"We should seek no injustice to railroad companies, but they ought to bear part of the burdens of government. They ought not to be relieved from taxation, leaving thereby extra burdens upon the private citizens, unless clearly exempt by contract binding upon the State."

House Journal for 1908, pp. 24, 25.

The legislature of Georgia passed the following resolution:

WHEREAS, it is announced that the Honorable John C. Hart of the County of Greene will be appointed by His Excellency, the Governor, Tax Commissioner of this State in accordance with an Act this day approved, and that the said John C. Hart has signified his willingness to accept said appointment, and

WHEREAS, The said John C. Hart is now under contract with the State of Georgia to represent the State in certain suits for taxes brought against several railroad corporations of this State, his compensation being conditional upon recovery, and,

WHEREAS, His duties as Tax Commissioner would in no wise conflict with his performance of his part of the contractor contracts aforesaid, it is,

Resolved by the General Assembly of Georgia, That it is the sense of the General Assembly that the acceptance on the part of the Honorable John C. Hart of the office of Tax Commissioner of this State and his performance of the duties of said office should and will conflict in no wise with any contracts existing between the said John C. Hart as attorney, and the State of Georgia; and,

Further, That the appointment of the said John C. Hart to the office aforesaid and his acceptance of same will not and should not nullify or void the future operation of said contracts.

Approved August 16, 1913.

Georgia Laws 1913, page 1306. The John C. Hart there mentioned was the Attorney General and counsel for the state in the prior litigation. The litigation there mentioned clearly refers to the attempts to tax the property of appellant, which were then continuing against the lessees.

L & N Railroad Co. v. Wright, 199 Fed. 454.

Wright v. L & N Railroad Co., 236 U. S. 687.

The District Court, in its opinion, nevertheless, said that it was not proven that the Attorney General was authorized to file answer and defend the prior action. In the first place, since it was the imperative duty of the Governor to direct the Attorney General to defend the action and since it was the duty of the Attorney General to defend on behalf of the State when directed by the Governor and since he did in fact file answer in his official capacity as Attorney General, it will be presumed that both the Governor and the Attorney General did their duty. In the second place, the official utterances both of the Governor and of the legislature show beyond question that they did approve of the action of the Attorney General. In the third place, failure of plaintiff to prove this part of its case is no ground for dismissing the action on motion. There was no motion filed by appellee for a summary judgment. Even if the facts presented were not sufficient to justify a summary judgment in favor of plaintiff, plaintiff is still extitled to an opportunity to try to prove its case on the trial or the merits.

Finally, the cases hold that there is such privity between an officer and his successor in office, in regard to acts under color office, that the successor is entitled to the benefits of and bound by a final decree in an action against his predecessor in office.

New Orleans v. Citizens Bank, 167 U. S. 371. Safeway Stores v. Porter, 154 F. (2d) 656.

Sunshine Coal Co. v. Adkins, 310 U. S. 381.

Tait v. Western Maryland Ry. Co., 289 U. S. 620.

U. S. v. Willard Tablet Co., 141 F. (2d) 141.

People v. Board of Review, 352 III. 157, 185 N. E. 248.

Crucia v. Behrman, 147 La., 144, 84 So. 525...

There is certainly every reason in justice and public policy why this should be the rule. If the contrary rule is established, the same questions can be relitigated by either party in regard to the same taxes for the same years every time there is a change in the person holding the office of tax collector. This is particularly true where the case turns on a question of fact. The most extended trial, and verdict of the jury, would be completely nullified by a change in the personnel of the office. In such case, either party could start all over. The state might seek to relitigate the collectability of taxes for 10, 20, or 50 years previous, even though settled by final judgment, subject only to the local statute of limitation, and there is question whether the statute would ever run if the state kept the matter in continuous litigation.

Prior Decree Concludes All Questions Raised.

A final decree permanently enjoining the collection of taxes contrary to a contractual provision in a charter is conclusive, not only as to the taxes then accrued but also as to future taxes, and not only as to the issues actually raised but also as to all issues that could have been raised. In such case, the question

at issue—the cause of action—is not the taxes for prior years, but the right to exemption—the contract of exemption.

Gunter v. Atlantic Coast Line, 200 U. S. 273.

Deposit Bank v. Frankfort, 191 U.S. 499.

New Orleans v. Citizens Bank, 167 U. S. 371.

And in this case, the existing permanent injunction specifically enjoins all future taxes except in accordance with that decree. (R. 131)

The ruling of this Court, in Wright v. Georgia Railroad & Banking Co., 216 U. S. 420, to the effect that the prior decisions of the Georgia Courts were not res judicata, is not to the contrary. That ruling was based on the premise that the federal courts give the same effect to judgment of a state court as the state court would give to such judgment, and the Georgia courts at that time had indicated that such judgment of the state court would not be res judicata as to taxes for future years.

But the existing final decree and permanent injunction here relied upon is the judgment of a federal court based on a federal question, and the effect of such judgment is a question of federal law and not of state law. And this Court has definitely settled that such judgment is res judicata as to taxes for future years.

Gunter v. Atlantic Coast Line, 200 U. S. 273.

Deposit Bank v. Frankfort, 191 U. S. 499.

Morsover, the Supreme Court of Georgia has subsequently held that a judgment as to the validity of taxes for one year may be res judicata as to subsequent years.

Coleman v. Field, 142 Ga. 205.

Prior Decision Right on Merits.

Moreover, even if the prior decision of this Court, holding the tax here sought to be imposed unconstitutional and void, were not technical res judicata, that decision is right on its merits and should be followed as stare decisis.

> Wright v. Ga. R. R. & Banking Co., 216 U. S. 420.

CONCLUSION

Therefore, the District Court should have not only overruled Appellee's motion to dismiss, but should have granted Appellant's motion for a summary judgment or judgment on the pleadings.

APPELLEE'S CONTENTIONS

The principal contentions of Appellee, State Revenue Commissioner, in the court below were:

- 1. That the action was against the state within the meaning of the eleventh amendment.
- 2. That the decision of the Supreme Court of Georgia in Musgrove v. Georgia Railroad & Banking Co., 204 Ga. 139, appeal dismissed by this Court, 235 U.S. 900, is conclusive and binding on this Court.
- 3. That Appellant waived the final decree of the Federal Court by going into the State Court.
- 4. That there were defenses not raised in the prior proceeding in this Court which require a different result.
- 5. That there is a plain, speedy and efficient remedy in the State Court which denies the Federal Court jurisdiction under the Johnson Act.

These contentions will be discussed in order.

1. That Suit Was Against State.

This contention, sustained by the District Court, is fully discussed above (pages 6-19).

The only case cited by the District Court is In re Ayers, 123 U. S. 443, which is discussed above on page 8.

In that case, the Attorney General of Virginia had been adjudged in contempt for refusing to dismiss actions in the State Courts against taxpayers who were not in privity with the plaintiff. The plaintiff alleged that the action of the Attorney General in bringing suit and making taxpayers prove the genuineness of the coupons they had tendered in payment of taxes depreciated the value of the coupons which plaintiff held and which he hoped to sell to other taxpayers. Clearly the order directing the Attorney General to dismiss actions brought in the name of the state required action by the state and by the Attorney General in his official capacity as agent of the state acting within the scope of his authority. It was, therefore, against the state within the rule recently restated by this Court in the Larson case (337. U. S. 682).

But when a taxpayer whose property was about to be seized, notwithstanding a tender of the coupons, brought suit to enjoin the taxing authorities, this Court held, in an opinion by the same justice, that the action was not against the state but was against an office exceeding his constitutional authority and a wrongdoer.

Allen v. B & O Railroad, 114 U. S. 311.

This case is analagous to the Allen case and not the Ayers

2. That Musgrove case is Conclusive.

Appellee contends that Musgrove v. Georgia Railroad & Banking Co., 204 Ga. 139, adjudicates that this case may not proceed and is conclusive on this Court.

That case merely held, however, as a matter of state practice, that an action for declaratory judgment in the State Court would not lie. It is, of course, competent for the state to determine, either by legislation or by judicial decision, what actions may be brought in the state courts. Such determination, in absence of unconstitutional discrimination, is purely a matter of state practice involving no federal question.

Appellee moved to dismiss the appeal to this Court in that case on the grounds that the decision involved only a question of state practice and no federal question, saying:

"Appellant bases its appeal on an erroneous assumption that the Supreme Court of the United States will assume jurisdiction on a decision of a State Court construing a State Statute providing for certain actions which may be filed in State Courts. The petition of Appellant against Appellee was based on a new statute, that of 1945 authorizing the granting of declaratory judgments in certain cases. The decision of the Supreme Court of Georgia ordered the petition dismissed on the grounds that declaratory judgment was not Appellant's remedy."

This Court agreed and dismissed the action on that ground.

Georgia Railroad & Banking Co., v. Musgrove,

Having secured the dismissal of the appeal on the grounds that the case involved no federal question, he is now estopped to contend that it did.

Michels v. Olmstead, 157 U.S. 198.

Whether suit can be maintained in the Federal Court is, of course, a federal question determined by federal law.

Harrison v. St. Louis & San Francisco Railroad, 232 U. S. 318, 328.

Of course the basic reasoning which should influence the State Court in deciding whether an action is against the State under state practice, and that which should influence the federal court in deciding whether an action is against the State under the 11th amendment, should be the same or similar. But there is nothing to prevent the two systems of courts from building up quite different bodies of law on the subject. The Supreme Court of Georgia has itself recognized that the question is different in the two courts and therefore the decisions of this Court are merely persuasive and not binding on the Supreme Court of Georgia.

Florida State Hospital v. Durham Iron Co., 192 Ga. 459,464.

And where the question thus arises under a different contract, or law, the prior decision is not conclusive, although the two contracts, or laws, are quite similar.

Commissioner v. Sunnen, 333 U.S. 591, 602.

And kews of different jurisdiction which are the same in words may be quite different in meaning because of the different construction put on the words by the different courts.

In the second place, the Supreme Court of Georgia decided only that suit for declaratory judgment would not lie. The reasoning of the Court bore very heavily on the fact that the action was one for declaratory judgment. The state Revenue Commissioner, in his motion to dismiss granted by this Court, said, "The decision of the Supreme Court of Corgia ordered the petition dismissed on the grounds that declaratory judgment was not appellant's remedy." This is not such action.

In the third place, Appellant already has a final decree and permanent injunction, which it is seeking to enforce. Such permanent injunction, affirmed by this Court and final for many years, can be enforced by the Court even though the action on which it was based might have been dismissed if objection had been made in time. (See discussion, supra, pp. 10-11)

Gunter v. Atlantic Coast Line, 200 U.S. 273.

Chicot County Drainage Dist. v. Baxter State Bank, 308 U. S. 371.

Finally, if, as Appellee contends, the judgment against his predecessor Wright is not binding on Appellee because against a different person, then the judgment in favor of his predecessor Musgrove is not binding in his favor.

3. That Appellant Waived the Prior Final Decree.

Appellee contends that Appellant waived its rights on the prior final decree, affirmed by this Court, by bringing the declaratory judgment action in the State Court.

In that action, however, Appellant specifically set up the prior decree of the Federal Court and prayed that it be enforced as res judicata. The state court dismissed the action for want of jurisdiction without intimating any opinion on the merits or on whether the prior decree was res judicata.

4. That There were Defenses Not Raised in Prior Proceeding.

Appellee contends that some objections raised by him in this case were not raised or decided in that case. If this be true, the fact that some of the greatest lawyers of the South, including Samuel Sibley, Robert Toombs, N. J. Hammond, and John C. Hart, in litigation extending over 30 years, did not consider such contentions worth raising is eloquent of their unsoundness. All such contentions certainly were equally available then—more so, if true, for the true facts were then more available than now.

(a) Failure to build all lines authorized.

Appellee contends that Appellant forfested its charter rights because it failed to build all the railroads it was authorized to build.

A corporation does not forfeit the rights, privileges or immunities set out in its charter merely because it fails to exercise all of the powers it is authorized to exercise.

Ill. Trust & Savings Bank v. Doud, 105 Fed. 123 (CCA 8).

If it did, practically all charters would be subject to forfeiture, for it is common knowledge that corporations generally have more charter powers than they exercise.

Moreover, the charter in this case clearly contemplates that the Appellant probably would not build all the lines authorized and that such failure would not forfeit any of the rights set out in the charter.

Sec. 15 of the original charter (App. v) expressly provides that the special provision for taxation shall apply "after the completion of said railroad, or cry one of them."

Sec. 1 of the charter (App. i) provides that Appellant shall build the railroad from Augusta to Union Point, and that when this main road is completed appellant "shall have power to construct three branches", and that, if the capital is not sufficient to build all three, then "the branch shall be first completed which the stockholders may by vote designate."

Sec. 15 (App. v) giving appellant exclusive franchise for 30 years, provides as a condition that "the work from, or between Augusta, and either [not both] of the places hereinbefore mentioned be commenced within two years and completed in six years."

Therefore, even as to the exclusive franchise, the charter required that only one, and not both, of the branches be completed.

Sec. 24 (App. viii) provides that the stockholders might divide the railroad from Augusta to Union Point, and the several branches into separate corporations, and that none of such corporations would be responsible for the acts or omissions of the others. This is the clearest possible expression of intent that the power to build the several branches was severable.

Sec. 2 of the Act of 1835 (App. x) amending the charter, provides that one-half of the capital might be used for banking purposes "until the completion of the road to Athens, and one of the Southern branches through Greensboro, to be designated by the vote of the stockholders; at which time any capital stock unemployed may be used for banking purposes."

This is express permission to build only one Southern branh through Greensboro, and to use any capital then remaining for banking. The use of the remaining capital for banking would necessarily exclude the duty of building of another southern branch to Eatonton.

The Athens branch and one southern branch through Greensboro was built in complete compliance with the charter.

Mcreover, Sec. 11 (App. xiv) provides that the only penalty for failure to build even one southern branch would be forfeiture of the right to use part of the capital for banking. If the legislature had intended additional penalty of forfeiture of tax exemption, it certainly would have said so.

Moreover, the state itself, through the legislature, changed the plans to extend the southern branch to Atlanta, to connect with the state road, rather than to Eatonton.

At the time this road was built, the building of railroads was considered of overwhelming importance to the state and to the public. The State of Georgia, and other states, finding it impossible to raise private capital, built railroads with their own money, guaranteed the bonds of private corporations, and otherwise did everything possible to secure the building of railroads. The plans for such railroad were necessarily fluid to meet changing conditions and to connect with other lines as they were built.

After appellant was chartered, the state began building a road from Chattanooga to Atlanta, then just a point in the

wilderness. It was of utmost importance that appellant road be extended to Atlanta, to connect with the state road and give it a connection with the sea, rather than to Eatonton as originally planned.

The legislature therefore, in 1837, passed an Act reciting the building of the state road, and authorizing appellant to extend its line from Greensboro to Atlanta to connect with , the state road (App. xv).

The legislature certainly knew that the Eatonton branch had not then been built. It also knew that the capital of appellant would be strained to the utmost in building a line to Atlanta, and that it would have no capital for a line to Eatonton. Clearly it considered the Atlanta line much more important, and acquiesced in the change of plans to build the road to Atlanta rather than to Eatonton.

By the Act of December 11, 1858, the legislature authorized an increase of capital to build a line to Eatenton and provided that such increased capital should be subject to tax at the usual rate, but that the Act should "under no circumstances be construed as to authorize any increase of rate of taxation upon any other stock or property connected with said company other than the additional stock allowed by this Act." (App. xviii)

Finally, by the Act approved December 7, 1859, and the Act approved December 19, 1859 (Georgia Laws 1859, p. 314, 315), the legislature withdrew from appellant the right to build the Eatonton branch and conferred the exclusive right on the Eatonton and Madison Railroad. The charter of the latter company provided that it would have all the privileges and immunities of the Central Railroad & Banking Co. One of such privileges was that no other line could be built within twenty miles (Ga. Laws 1833, p. 246). This clearly withdrew any right of appellant to build a branch to Eatonton.

The legislature repeatedly recognized the special provision for taxation was in force notwithstanding the failure to build the Eatonton branch. (App. xvii, xviii, xix)

If the question were otherwise in doubt, the failure of the state or any one else to raise the contention for over a hundred years, during which all persons acquainted with the facts have died and records have been lost or destroyed, would raise a presumption that the state acquiesced in the failure to build a line to Eatonton, and would bar the contention at this late date.

(b) Failure of Caption of Act to set out provision as to taxation.

Appellee contends that the original charter of Appellant was void under the then constitution of Georgia because the provision as to taxation was not expressly set out in the caption of the Act. This is, of course, a matter of Georgia law.

The Supreme Court of Georgia has decided this contention adversely to Appellee. In Goldsmith v. Georgia Railroad Co., 62 Ga. 485, involving this very charter, the court said:

"That the limit on the taxing power of the state over the Georgia Railroad and Banking Company, is not expressed or indicated in the title of the act of incorporation, does not render that provision of the charter unconstitutional."

Appellee contends that statement was obiter, because the case was dismissed for failure to comply with the technical requirements of the law. However, the same holding was made in Goldsmith v. Romo Railroad Co., 62 Ga. 473, which was decided on its merits:

"An act incorporating a railroad company need not express in its title any of the powers, rights, privileges or immunities which the charter is intended to confer. The charter of a private corporation is a contract as between the state and the corporation; and the stipulations, terms and conditions of a contract are to be looked for in the body of the instrument, not in the title or caption."

"The doctrine that the charter of a private corporation is, as between the state and the corporation, a contract, has be-

come an established principle of American law. Uniformity and universality have been imparted to the rule by repeated decisions of the Supreme Court of the United States, so that now nothing in the whole range of law is better set led. A law or ordinance to incorporate a railroad company, is thus a law or ordinance to contract with it on the part of the state. Notice given in the title or caption of the act, that the state means to incorporate something, comprehends notice that it means to contract. Why should the terms, specifications and conditions of a contract be indicated in the caption or title? They are appropriate to the body of the instrument, and are generally looked for in the body, not the caption or title."

(c) Atlanta Branch.

Appellee contends that, in any event, the Atlanta branch, between Madison and Atlanta, is not subject to the special provision as to taxation.

The Act approved December 25, 1837 (App. xv) expressly provides that Appellant "shall have all the powers and privileges, rights and immunities in the construction of said branch from Madison, as aforesaid, to the said state railroad, as are contained in the several acts heretofore passed, and now in force, constituting the charter of the Georgia Railroad and Banking Company, as fully and to the same extent as if said continuation had originally been part of the Georgia Railroad."

Moreover, the original charter provided that the "capital" of Appellant should be subject to tax only as provided in the charter. The courts have held that this meant the property in which the original capital was lawfully invested. Certainly the original capital was lawfully invested in the Atlanta branch and therefore is subject to the special provisions for tax to the same extent as other property in which the capital was lawfully invested.

This question has been decided against Appellee both by the Supreme Court of Georgia and by this Court. In State of Georgia v. Georgia Railroad & Banking Co., 54 Ga. 423, the

lower court specifically considered and decided what property of the railroad was exempt and held that all of the property, except that acquired with the proceeds of the sale of 440 shares of new stock issued after 1863, was exempt. That decision was affirmed by the Supreme Court.

And in Wright v. Georgia Railroad & Banking Co., 216 U. S. 420, the Comptroller General, by his counsel the Attorney General, specifically asked the court to consider and decide what property was subject to the special tax provision. The Circuit Court held, by specific description, that the Atlanta branch was subject to that provision. This Court also considered what property was subject to that provision and held that the Washington branch, which had been acquired in a subsequent merger, was not exempt but affirmed the decree as to the Atlanta branch.

(d) Charter as Contract.

Finally, Appellee contends that the charter of this appellant was not a contract within the meaking of the Constitution of the United States. If the court should sustain this contention, it would mean overruling the Dartmouth College case and all the hundreds of cases following that case. We assume, in the absence of a specific request from the court, that the court does not care for re-argument on such fundamental question so long and firmly embedded in the law.

(e) Concluded by prior decree.

Finally, all of the above questions raised by appellee, all of which could have been raised in the prior proceeding, are concluded by the final decree and permanent injunction affirmed by this Court. See pages 10-20 of this brief.

5. That Johnson Act Withdrew Jurisdiction.

Appellee contends that jurisdiction is withdrawn by Title 28, U. S. Code, Sec. 1341, which provides:

"The District Court shall not enjoin, suspend or restrain the assessment, levy, or collection of any tax under state law

where a plain, speedy and efficient remedy may be had in the courts of such state."

Apparently appellant does not have any remedy in the courts of Georgia. If it has any such remedy it is certainly not plain or efficient within the meaning of the Act.

In order for a remedy in the state court to oust the federal court of jurisdiction, there must not be any reasonable doubts as to the existence or form of such remedy.

Spector Motor Co. v. McLaughlin, 323 U. S. 101.

> Hillsboro v. Cromwell, 326 U. S. 620.

Atlantic Coast Line v. Daughton, 262 U. S. 413.

Corporation Commission v. Carey, 296 U. S. 452.

Appellant in this case did seek a remedy in the state courts. It brought action for declaratory judgment, which seemed the clearest remedy. The Supreme Court of Georgia held that such remedy was not available and specifically declined to express an opinion whether any remedy, and if so what remedy, was available.

Musgrove v. Georgia Railroad & Banking Co., 204 Ga. 139.

In the oral argument in the District Court counsel for appellee admitted that he would contend that any remedy which appellant might seek in the state court was not available.

The District Court, familiar with the Georgia law, was convinced that there was no plain remedy under the Georgia law.

Appellee suggests four possible remedies:

(1) Affidavit of illegality.

M

(2) Appeal to arbitration and thence to the courts.

- (3) Suit for injunction.
- (4) Payment and suit to recover.

This requires a consideration of the confusing and conflicting statutes which have been passed.

- (1) Affidavit of illegality.
 - (a) Has been repealed.

The original Act of 1874 (App. *x), imposing ad valorem tax on railroads, provided that the railroad might file an affidavit of illegality to the execution issued by the comptroller, and that such affidavit would be returned to the Superior Court of Fulton County for trial.

The Act of 1889 (App. xxii), providing for county taxation, provided that the comptroller would issue an execution for the tax due the county and that the railroad might file affidavit of illegality and that such affidavit would be returned to the Superior Court of the county in which the tax was claimed to be owing.

The Act of 1890 (App. xxv), providing for taxation by cities contained similar provision.

The Act of 1918 (App. xxvi), however, changed the remedy. It provided that if any taxpayer required to make returns to the comptroller failed to return its property for its full value, the comptroller should assess it at its true value and notify the taxpayer "which valuation shall be final unless the person so notified raises the question that it is excessive." If so, the taxpayer must appeal to arbitration and the decision of the arbitrators is made final. If the taxpayer contends that the property is not subject to tax, he may file suit in equity in the Superior Court of Fulton County.

This Act apparently repealed the prior remedies. It certainly repealed the remedies as to valuation for it provided that the assessment, or the award of the arbitrators, would be final.

The reorganization Act of 1938 (App. xxviii) repealed all existing remedies and established one plain, simple remedy. It transferred the function of the comptroller to the Revenue Commissioner created by the Act. It created a Board of Tax Appeals, and provided that any taxpayer aggrieved by any assessment of the commissioner might appeal to the Board, and thence to the courts. It further provided:

"The Commissioner's assessment shall not be reviewed except by the procedure hereinafter provided; no trial court shall have jurisdiction of proceedings to question such assessment except as in this Act provided." (App. xxix)

The Courts of Georgia held that act meant what it said and that the appeal to the Board covered all questions and was the exclusive remedy.

Forrester v. Pullman Co., 66 Ga. App. 745.

Forrester v. Pullman Co.? 192 Ga. 221.

However, the Act of 1943 (App. xxxi) abolished the Board of Tax Appeals. Taxpayers were given the right to appeal directly from the assessment of the Commissioner to the courts, except that the Act expressly provided that such right of appeal would not apply to corporations required to make ad valorem returns to the Commissioner (App. xxxiii). This exception clearly covered Appellant. Such taxpayers were given only the right to

"Refer the question of true value or matter to arbitrators as provided for by Chapter 92-60 of the Georgia Code of 1943." (App. xxxiii)

It is clear that the right to appeal to arbitrators relates only to valuation and not to taxability.

Columbus Mutual Life Ins. Co. v. Gullatt, 189 Ga. 747. Therefore, as to Appellant, the Act of 1943 did not provide any remedy for testing taxability of the property.

The Act of 1843 did provide:

"Provided, however, that nothing herein contained, and no provision of this Act shall be construed to deprive a tax-payer against whom an execution for taxes has been issued under an assessment by the State Revenue Commissioner of the right to resist enforcement of the same by affidavit of illegality." (App. xxxii)

At the time the Act of 1943 was passed, however, railroad corporations such as Appellant clearly had no right to file affidavit of illegality in connection with an assessment of ad valorem taxes. Such right probably had been withdrawn by the Act of 1918 and certainly had been withdrawn by the Act of 1938. The above proviso in the Act of 1943 did not purport to create a right of affidavit of illegality. It merely preserved any such right then in existence. At that time no such right existed for Appellant in the circumstances of this case.

(b) Affidavit of lilegality never available in Circumstances of this case.

Moreover, even if the remedy of affidavit of illegality had not been repealed, it would not have been available in the circumstances of this case. The Act of 1874 codified in Code Sec. 92-2604, the only section ever giving right of affidavit of illegality, expressly provided that the railroads might file affidavit of illegality orly "after making the returns required in Section 92-2602 and after paying the tax levied on such corporation." (App. xx) The Supreme Court of Georgia has held that compliance with that condition, within the time provided by law, is a condition precedent to the right of affidavit of illegality and that failure to comply is grounds for dismissal.

Goldsmith v. Georgia Railroad Co., 62 Ga. 485.

The Supreme Court further held that a railroad which had not complied with those conditions within the time provided

by law had no adequate remedy at law and therefore could sue in equity.

"It (the railroad) is remedyless now under the mode provided by the Act of 1874. It has no remedy at law as the case now stands. It cannot make now the returns required to have been made in 1876 and 1877 because the time has passed; and if it has any remedy it is in equity."

Wright v. Southwestern R. R. Co., 64 Ga. 783, 793.

That statement of the Supreme Court of Georgia is applicable to Appellant in this case. It certainly cannot now make the return and pay the tax within the time provided by law because that time has passed.

(c) Remedy not efficient.

Moreover, if the remedy of affidavit of illegality were available, it would not be adequate or efficient because of the multiplicity of suits involved.

As pointed out above (p. 33), the Act provides that the Commissioner shall issue separate executions for the tax due to the state and for tax due to each county and city, and that affidavits of illegality to such execution shall be returned to the Superior Court of the county in which the tax is claimed. (App. xxiv) This railroad runs through fourteen counties and sixteen municipalities. This means that, even if affidavits of illegality were available, to contest the taxes for the ten years claimed by Appellee by affidavit of illegality would require 310 executions and 310 affidavits of illegality returnable to fourteen different courts. Any remedy involving such multiplicity of action is not adequate or efficient.

Graves v. Texas Co., 298 U. S. 393.

Union Pacific R. R. v. Weld County, 247 U. S. 282.

Risty v. Chicago, R. I. P. Railroad, 270 U. S. 378.

The Supreme Court of Georgia, even before the subsequent statutes apparently repealed the remedy of affidavit of illegality, held that these uncertainties and complications were such that the remedy was not adequate.

> . Wright v. Southwestern Railroad, 64 Ga. 783.

(2) Appeal to court under Act of 1943.

The Act of 1943 (App. xxxi) does give taxpayers generally the right of appeal to the Superior Court from assessments of the Commissioner, but this Act in express terms provides that this right of appeal shall not apply to corporations required to make returns of ad valorem taxes to the Commissioner (App. xxxiii). This exception includes the taxes herein mentioned.

That Act gives such taxpayers the right to appeal to arbitrators on the question of value or amount (App. xxix) but the right to appeal to arbitration clearly is limited to questions of value and does not include the question of taxability.

Columbus Mutual Life Ins. Co. v. Gullatt, 189 Ga. 747.

(3) Suit for Injunction.

Clearly the right to sue for injunction in the State Court is not available.

The Act of 1938 (App. xxix), quoted above (p. 34), clearly withdraws this right, and there is no subsequent proviso which could be construed as reinstating the right to sue in equity. Moreover, the Supreme Court of Georgia, in Musgrove v. Georgia Railroad & Banking Co., 204 Ga. 139, strongly intimated that suit in equity to enjoin the tax could not be maintained in the courts of Georgia.

(4) Right to pay and sue to recover.

The Act of 1938 (App. xxviii) does give taxpayers right to sue to recover any tax erroneously or illegally paid to the State Revenue Commissioner.

However, only a relatively small part of this tax would go to the State of Georgia. By far the greater part would be payable to the local county tax collectors. There is no provision under the Georgia law for recovering taxes paid to a local county tax collector.

Johnson Act does not apply to enforcing injunctions already issued.

Finally, the Johnson Act can have no application to an ancillary action brought to enforce a prior final decree and permanent injunction.

Gunter v. Atlantic Coast Line, 200 U. S. 273.

Such action can be brought only in the court which rendered the original decree.

Railroad Co. v. Chamberlain, 6 Wall 748.

Therefore, the State Court cannot give a plain, speedy and efficient remedy to enforce an injunction previously issued by the Federal Court.

Respectfully submitted,

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APPENDIX

STATUTES OF GEORGIA CITED

- I. Charter of Georgia Railroad & Banking Co., and Amendments Thereto.
- (1) Act Approved December 21, 1833, Georgia Laws of 1833, p. 256.
- AN ACT—To Incorporate the Georgia Railroad Company, with powers to construct a Rail or Turnpike Road from the City of Augusta, with Branches Extending to the Towns of Eafonton, Madison, in Morgan County, and Athens; to be carried beyond those places, at the discretion of said Company; to punish those who may wilfully injure the same; to confer all corporate powers necessary to effect said object; and to repeal an Act entitled "An Act to authorize the formation of a Company for constructing a Railroad or Turnpike from the City of Augusta to Eatonton, and thence westward to the Chattahoochee River, with Branches thereto, and to punish those who may injure the same," passed the 27th December, 18\$1.
- SEC. 1. Be it enacted, etc., That the Company provided for in this Act, and hereinafter more especially incorporated and authorized, shall and may direct and confine their first efforts and enterprise to the formation and completion of a Railroad communication between the City of Augusta and some point in the interior of the State, to be agreed upon by the stockholders, which Road shall be called the Union Railroad; and the same being completed, the Company shall have power to construct three Branch Railroads, beginning at the point agreed upon as the termination of the Union Road, or such point for the Middle Road as the stockholders may selecte one running to Athens—one to Eatonton—and the third to Madi-

son, in Morgan County; which Branches shall be erected simultaneously; Provided, The amount of stock subscribed will warrant the completion of all at the same time; and if the stock subscribed will not warrant the completion of all of said Branches at one and the same time, then that Branch shall be first completed which the stockholders may by vote designate. The Company shall have the further power to continue the Athens Branch towards any point which may be agreed upon, on the Tennessee River—all of which shall be done at such time and in such manner as the stockholders may direct.

- SEC. 2. The Company shall have the exclusive privilege of constructing Railroads from any point in this State within twenty miles of the Road herein designated as the Union Road and its Branches, leading to Eatonton, Athens and Madison, continuously to the City of Augusta, for and during the term of thirty-six years.
- SEC. 3. The stock of the Company authorized and incorporated by this Act shall consist of fifteen thousand shares, of one hundred dollars each share, and the said Company to be formed on that capital; but the said Company shall be at liberty to enlarge their capital, as, in the progress of their undertaking, they may find necessary; and that, either by additional assessments on the original shares, not to exceed in the whole the sum of twenty dollars in addition to each original share, or by opening books for enlarging their capital by new subscriptions in shares of not more than one hundred dollars, so as to make their capital adequate to the works they may undertake, and also to prescribe the terms and conditions of the new subscriptions. And it shall be lawful for the Company, from time to time, to invest so much, or such parts of their capital, or of their profits, as may not be required for immediate use, and until it may be so required, in public stock of the United States, or of this State, or of any incorporated Bank, or lend out the same at interest on good security, and draw and apply the dividends, and when and as they shall see fit, sell and transfer any parts or portions thereof: Provided, That nothing herein contained shall be so construed as to authorize said Company

to issue bills of credit, or to loan out any moneys at a greater rate of interest than eight per cent.

SEC. 9. The aforesaid Company, to be organized as aforesaid, shall be called "The Georgia Railroad Company," and shall have perpetual succession of members, may make and have a common seal, and break or alter it at pleasure; and their corporate name aforesaid may sue and be sued, answer and be answered unto, in all courts of law and equity, or judicial tribunals of this State; and shall, at all times, be capable of making and establishing, altering and revoking all such regulations, rules and By-Laws for the government of the Company and its Directors, as they may find necessary and proper for the effecting of the ends and purposes intended by the association and contemplated in this Act? Provided, Such sales and regulations, and By-Laws, shall not be repugnant to the Laws and Constitution of this State.

SEC. 10. The said Georgia Railroad Company shall have power and capacity to purchase, and have and hold, in fee. simple, or for years, to them and their successors, any lands, tenements or hereditaments that they may find necessary for the site, on and along which, to locate, run and establish the aforesaid Railroad and Railroads, or any Branches thereof; or to vary or alter the plan or plans, and of such breadth and dimensions through the whole course of the Road and Roads, asthey may see fit; and also, in like manner, to purchase any lands contiguous, or in the vicinity of the Railroad and Railroads, hereby authorized, that they may find necessary for the procuring, and from time to time, readily obtaining all necessary or proper materials, of what kind soever, for the constructing, repairing, and adequately guarding and sustaining the said Railroad or Railroads; and in like manner to purchase all rights of way on land, and all necessary privileges in waters or water courses, that may lie on or across the route which the said Railroad or Railroads may pass; and also all lands contiguous thereto, that may be found necessary for the erecting of toll houses, store houses, workshops, barns, stables, residences and accommodations for servants or agents or mechanics, and for the stationing and sustaining all animals of labor. And the said Company shall have power, if need be, to conduct the Railroad across any public road, and, by suitable bridges over and across all or any rivers, creeks, water or water courses, that may be in the route; or if they should deem it more convenient and suitable, may pass carriages, using the Roads, by convenient boats, across the same: Provided, That the said Company shall so construct their Railroad across all public roads as not to obstruct or injure the same.

SEC. 12. The said Georgia Railroad Company shall, at all times, have the exclusive right of transportation or conveyance of persons, merchandize, and produce, over the Railroad and Railroads to be by them constructed, while they see fit to exercise the exclusive right: Provided, That the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds, on heavy articles, and ten cents per cubic foot, on articles of measurement, for every one hundred miles; and five cents per mile for every passenger: Provided, always, That the said Company may, when they see fit, rent or farm out all or any part of their exclusive right of transportation or conveyance of persons, on the Railroad or Railroads, with the privilege to any individual or individuals, or other company, and for such term as may be agreed upon, subject to the rates about mentioned. And the said Company, in the exercise of their right of carriage or transportation of persons or preperty, or the persons so taking from the Company the right of transportation or conveyance, shall, so far as they act on the same, be regarded as common carriers. And it shall be lawful for the said Company to use or employ any section of their intended Railroad, subject to the rates before mentioned, before the whole shall be completed; and in any part thereof, which may afford accommodation for the conveyance of persons, merchandize or produce. And the said Company shall have power to take, at the store houses they may establish on or annexed to their Railroad, all goods, wares, merchandize and produce

intended for transportation or conveyance; prescribe the rules of priority; and charge such just and reasonable terms and compensation for storage and labor as they may by rules establish (which they shall cause to be published), or as may be fixed by agreement with the owners; which compensation shall and may be distinct from the aforesaid rates of transportation.

SEC. 14. Whenever the Company aforesaid shall see fit to farm out as aforesaid, to any person or persons, or body corporate, any part of their exclusive right of conveyance and transportation, or shall deem it expedient to open the said road, or any part thereof, to public use, they shall and may adopt and enforce all necessary rules and regulations, and have power to prescribe the construction and size or burthen of all carriages and vehicles, and the materials of which such shall be made, that shall be permitted to be used or pass on the said Railroad, and the locomotive power that shall be used with them.

SEC. 15. The exclusive right to make, keep up and use the Railroads and transporations, authorized by this Act, shall be for and during the term of thirty-six years, to be computed from the time when the said Road from Augusta to either of the points hereinbefore designated, shall be completed for transportation: Provided, That the subscription of stock or shares of said Company to the amount of at least five thousand: shares as aforesaid, be filled up within six months from the passing of this Act, and the work from, or between Augusta, and either of the places hereinbefore first mentioned, be commenced within two years and be completed within six years after the five thousand shares shall be subscribed. And after said term of thirty-six years shall have elapsed, though the Legislature may authorize the construction of other Railroads, for the trade and intercourse contemplated herein: Nevertheless, The Georgia Railroad Company shall remain and be incorporate, and vested with all the estate, powers and privileges as to their own works herein granted and secured, except the exclusive right to make, keep up, and use Railroads over and through such parts of the country, that shall so have expired

by the foregoing limitations; but the Legislature may renew and extend that exclusive right, upon such terms as may be prescribed by law, and be accepted by the said incorporated Company. The stock of the said Company and its Branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said Railroads, or any one of them; and after that, shall be subject to a tax not exceeding one-half per cent. per annum on the net proceeds of their investments.

SEC. 18. Every person who shall be a subscriber to or holder of stock in the said Company, shall pay to the Company the instalmentof fifteen dollars on each and every share, in such periods of not less than six months, as shall be prescribed and called for by the Directors, after which the Directors may call for the further moiety of each share, in payments not exceeding fifteen dollars per share, in periods of not less than six months, of which periods of payment by instalment on the shares, and the sums required, the Board of Directors shall cause public notice to be given for at least four weeks previously to the day of payment, by advertising the same in one or more of the gazettes of Milledgeville and Augusta: And failure to pay up any one of the instalments so called for as aforesaid shall induce a forfeiture of the share and shares on which default shall be so made, and all past payments thereon, and the same shall vest in and belong to the Company, and may be appropriated as they shall see fit. It shall be the duty of the Company, as soon as may be after they are organized, or of the Board of Directors, to issue scrip to each subscriber for the shares he holds, and deliver the same at the time of the second payment; on which, if convenient and practicable, receipts for the instalments paid, and that may successively be paid, may be endorsed, and the scrip-issued may be made assignable and transferable in person or by attorney, at the office and on the books of the Company; and the said corporation shall and may, in and by their By-Laws, rules and regulations, prescribe the mode of issuing the evidences of shares of stock and the terms

and conditions, as also the times and manner in which shares in the Company may be transferred.

SEC. 19. Whensoever the said Company shall find occasion to increase their capital by additional assessments on the original shares, as before mentioned, in the third section of this act, within the limits therein mentioned, the said further sum on each share shall not be called for in less than two instalments at similar periods, and like notices as are mentioned and provided in the immediately preceding section; and failure to pay up such additional assessments shall in like manner, as therein provided, induce a forfeiture of the Company of the share or shares of stock on which default should so be made.

SEC. 20. The President and Directors shall be styled "The Directors of the Corporation," and shall make all contracts and agreements in behalf thereof, and have power to call for all instalments, declare all dividends of profits, and to do and perform all other acts and deeds which, by the By Laws of the corporation, they may be empowered or required to do and perform; and the acts of the Direction, or their contracts, authenticated by the signatures of the President and Secretary. shall be binding on the corporation without seal. Regular minutes shall be kept of all meetings of the Direction, and of the acts there done; and the Direction shall not exceed in their contracts the amount of the capital of the corporation; and in case they shall do so, the President and Directors who are present at the meeting at which such contract or contracts so . exceeding the capital shall be made, shall be jointly and severally liable for the amount of the excess, both to the contractor or contractors and to the corporation; Provided, That any one may discharge himself from such liability by voting against such contract or contracts and causing such vote to be recorded ' in the minutes of the Direction, and giving such notice thereof to the next general meeting of the stockholders.

SEC. 22. If the Company, instead of constructing the Rail-roads herein specified, should deem it preferable to construct

common roads, and use steam carriages thereon, they shall have power to do so under the same regulations, and with the same privileges in all respects as are herein prescribed in relation to railroads.

SEC. 23. The Act entitled "An Act to authorize the formation of a Company for constructing a Railroad or Turnpike from the City of Augusta to Eatonton, and thence westward to the Chattahoochee River, with Branches thereto, and to punish those who may injure the same," passed the 27th December, 1831, is hereby repealed in every clause and section thereof; and this Act of incorporation shall be deemed and taken to be a Public Act, and shall be judicially taken notice of as such without special pleading.

SEC. 24. Whensoever a number of the stockholders in interest amounting to three thousand shares, shall unite for the furtherance, construction and completion of either of said Branches of said Road, they shall have power to terminate said Union Road, and may, at such time and place as they may choose and designate, determine for themselves the point or place of diverging with such Branch of said Road as they may then and there point out and ascertain to be identified with their interest as stockholders: Provided, The said stockholders so electing shall have given to the said Union Company, their agents or attorney, ten days previous notice of such their choice, of their respective fames and their respective disunion. of stock, and of the point or place of their intended disunion. That said stockholders so electing and determining as aforesaid, shall and may then and there be and exist as a separate body corporate, and shall then and there, and thenceforward, have, use, and exercise all the rights, privileges, immunities and enjoyments hereby given, granted and secured to said Union Company, to attach, be held, used and exercised by said stockholders so electing as aforesaid, of, for, on account of, and to the particular Road to which they may then and there direct and apply themselves. That their powers as a corporate body shall be similar, and their rights, privileges and immunities, in regard to said Road, so diverging, shall be the

same, and subject to the same restrictions, as herein and hereby provided; imposed and granted to, upon and for the said Union Company. They shall not be called on by said Union Company, from and after the day of their said election and determining said point of diverging, for any other or further payment on stock, but may proceed as a distinct Company to construct a Branch of said Road to and through the respective points-Eatonton, Greensborough and Madison, or Athens, respectively, according to circumstances, as they may choose, and said stockholders so electing and determining as aforesaid, shall be known, according to the Branch to which they shall respectively attach themselves, by the corporate name and style of the Eatonton Railroad, the Greensborough and Madison Railroad, or the Athens Railroad. And said Branch Companies, so named, shall and may apply the residue of their stock; unpaid and unapplied at said time of diverging, to the separate and sole use and construction of the Branch to which each may be attached, and shall and may have, use and enjoy, all the rents. issues and profits of said Branch, to which they may be attached, to the sole use, benefit and behoof of themselves, their heirs and assigns, for the time heretofore limited to said Union Company, and according to the provisions of this Act. They shall in no way be liable to each other as separate Companies, for the expenses or repairs of their respective Roads, nor in any way responsible for each other's acts, from and after the time and place of disunion or diverging, designated aforesaid, so long as they may remain and exist as separate Companies. The stockholders in the Union Road, to the point of diverging, shall, nevertheless, exist as one corporate body, and be liable as such that far, and receive the benefits of said Union Road to said point, according to the provisions hereinbefore contained: Provided, That nothing herein contained shall prevent said Branch Companies from uniting their interests and efforts, as circumstances mutually moving them may suggest:

(2) Act approved December 18, 1835, Georgia Laws of 1835, p. 180.

Whereas, The people of the West have in contemplation to make a communication between the City of Cincinnati and the Southern Atlantic coast by means of a Railroad; and whereas the best route for said communication is believed to be through the State of Georgia; and whereas, the building of the Georgia Railroad is now in progress, and will be an important link in the line of said communication.

SEC. 1. Be it, therefore, enasted, &c., That the stockholders of the Georgia Railroad Company, and such other persons as shall take stock under this Act, and their successors and assigns, shall hereafter be a body corporate by the name and style of the Georgia Railroad and Banking Company, and by the said corporate name shall be, and are hereby made able and capable in law. to have, purchase, receive, possess, enjoy. and retain, to them and their successors, lands, rents, tenements, hereditaments, goods, chattels, and effects, of whatsoever kind, nature or quality the same may be, sufficient for the construction of banking houses, and the erection of the Railroad only, and the same to sell, grant, demise, alien, or dispose of; to sue and be sued, plead and be impleaded, answer and be answered unto, defend and be defended in courts of record, and also to make and have a common seal, and the same to break, alter or renew, at their pleasure, and also, by and through the Board of Directors, to ordain, establish, and put in execution, such by-laws, rules and regulations as shall be necessary and convenient for the governing of said corporation, as to them may or shall appertain; Provided, That such by-laws, rules and regulations shall not be contrary to the Laws and Constitution of this State or of the United States, nor to the rules, regulations, restrictions and limitations prescribed in this Act.

SEC. 2. Be it further enacted, That the stock of said Company shall consist of two millions of dollars, one-fourth of which, applied to banking purposes, shall be gold or silver coin,

in shares of one hundred dollars each; of which capital one-half may be used for banking purposes, and not more, until the completion of the Road to Athens, and one of the southern Branches through Greensborough, to be designated by a vote of the stockholders; at which time any capital stock unemployed may be used for banking purposes; Provided, however, That the continuation of said Road beyond Athens, so as to connect with the Cincinnati Road, shall be steadily prosecuted so soon as the Company shall have satisfactory evidence that the said connection can be formed.

SEC. 3. And be it further enacted, That the Directors of the Georgia Railroad Company, for the time being, shall have power at their discretion to open books of subscription at such times and places as they may think proper, giving such notice in one or more of the public gazettes of this State as they may deem necessary for additional subscriptions to the capital stock of said Georgia Railroad and Banking Company; on which subscriptions there shall be required to be paid, at the time of subscribing, the amount per share that may be prescribed by the Directors aforesaid; and that the President and Directors of the Georgia Railroad Company, for the time being, shall be the President and Directors of the new corporation until the time fixed for the annual election next thereafter.

SEC. 4. And be it jurther enacted, That the Board of Directors of the said corporation shall have power at its discretion to establish agencies for carrying on said work, and may have branches of its backing powers, not exceeding three, and at such times as to them may seem expedient: Provided, That no branch for banking purposes shall be established or located in any incorporated town without the consent of the corporate authorities thereof first obtained for that purpose.

SEC. 5. And be it further enacted, That the Directors aforesaid shall have power to open books for the subscription of stock, from time to time, until the capital stock shall be filled up; and that all further instalments on the stock herein provided to be subscribed for, shall be called for and paid in

according to the provisions of the Act of which this is an amendment, and shall be under the same liabilities in case of failure to pay.

- SEC. 6. And be it further enacted, That the bills obligatory and of credit, notes, and other contracts whatsoever, in behalf of the said corporation, shall be binding and obligatory on the said corporation: Provided, The same be signed by the President and countersigned by the Cashier of the said Company: and the funds of the corporation shall, in no case, be held liable for any contract or engagement whatsoever, unless the same shall be so signed and countersigned, as aforesaid, except for such checks or bills of exchange as shall be made or endorsed by the Cashier or President thereof, in the course of the business of said Company, and except for such contracts as shall the made under the authority of the Board for work done on the Road; and the funds of the corporation shall, at all times, be subject to the inspection of the Board of Directors and Stockholders, when convened, according to the provisions of this Act, and of the Act of which this is an amendment.
- SEC. 7. And be it further enacted, That the said corporation shall not, at any time, suspend or refuse payments in gold or silver coin, or any of the notes, bills or obligations, and if the said corporation shall, at any time, refuse or neglect to pay, on demand, any bill, note or obligation, issued by the corporation according to the contract, promise or undertaking, therein expressed, to the person or persons entitled to receive the same, then, and in every such case, the holder of such note, bill, or obligation, shall respectively be entitled to receive and recover interest on the same, until the same shall be fully paid and satisfied, at the rate of ten per cent per annum, together with the lawful interest thereon, from the time of such demand as aforesaid.
- SEC. 8. And be it further enacted, That the following rules, regulations, limitations and provisions, shall form and be the fundamental articles of the said corporation:

RULF I. The number of votes to which each stockholder shall

be entitled, shall be according to the provisions of the 7th section of the Act of which this is an amendment.

II. The Cashier and other officers of the banking department of said corporation (the President excepted), shall, before they enter upon the duties of their offices respectively, give bond for the faithful performance of their duties, with such security as may be required by the Board of Directors.

the total amount of debts which the said corporation shall, at any time, owe, whether by bill, bond, note, or other contract, shall not exceed three times the amount of capital stock actually paid in, and set apart for banking purposes.

IV. Dividends of the net profits of the stock used in banking purposes, or of so much thereof as may be prudent, shall be declared and paid half yearly, if the condition of the Company warrant it, until the Road shall yield a profit, when and in which case, that profit may also in like manner be divided; and such dividend shall, from time to time, be determined by a majority of Directors, at a meeting to be held for that purpose, and shall, in no case, exceed the amount of the net profits actually acquired by the corporation, so that the capital stock thereof shall never be impaired.

V. The Directors shall cause to be kept fair and regular entries in a book to be provided for that purpose, of their proceedings; and on any question, when any one Director shall require it, the yeas and nays of the Directors voting shall be recorded in such book, and the minutes be at all times, on demand, produced to the stockholders, at their general meeting.

VI. So soon as fifty per cent. of the stock already subscribed, and of the stock which may hereafter be taken in the said Company, shall have been paid in, the Company shall have the power and privilege, and not till then, of commencing banking operations, and for that purpose shall have the power to prepare and issue notes, signed by the President and countersigned by the Cashier, as in the usual course of banks in such cases: Provided, That of the sum so received, one-half shall be set

apart for their said banking operations, and the other half to the building of the Road, and so on in the like ratio as to all further instalments which may thereafter be called in.

- NII. That portion of the capital stock hereinbefore provided for, and set apart for the purpose of building the Road, shall in no wise be diverted from that object, except as provided for in the second section of this Act.
- SEC. 9. And be it further enacted, That the President and Directors of the Company shall be elected annually, as provided for in the Act to which this is an amendment; and the Board of Directors of the said corporation shall have power to appoint a Cashier and such other officers as may be necessary for the transaction of the banking business herein provided for, and to allow them reasonable compensation for their services; and shall be capable of exercising all such powers and authorities for the well governing and ordering of the affairs of said corporation as to them shall seem best calculated to promote the best interest of the Company.
 - SEC. 10. And be it further enacted. That the principal office of said Company shall be located at Athens, and all elections and meetings of the stockholders shall be held at such principal office, except when otherwise ordered by the Directors on special occasions.
 - SEC. 11. And be it further enacted, That the Union Railroad, as authorized by the first section of the Act to which this is an amendment, shall be completed within four years from the passage of this Act; and the Branch to Athens, and one of the southern Branches through Greensborough, which shall be designated by a vote of the stockholders, shall be completed within six years after the passage of this Act; and on failure thereof, the banking privileges hereby granted shall be thenceforth forfeited, and all banking operations shall thenceforward, in such event, be made to cease and determine.
 - SEC. 12. And be it further enacted, That the banking privileges hereby granted shall be and continue for and during

the term of twenty-five years, to be computed from the time fixed by this Act for the completion of the Union Road.

SEC. 13. And be it further enacted, That the Act to which this is an amendment shall be and remain in full force and effect, in every section and clause thereof, except where it conflicts with the provisions of this Act.

SEC. 14. And be it further enacted, That all the acts done and contracts made by the Georgia Railroad Company are hereby declared to be of binding efficacy on the Georgia Railroad and Banking Company; and all the rights to property acquired by the Georgia Railroad Company, of whatsoever nature or kind the same may be, shall pass to and be vested in the Georgia Railroad and Banking Company as fully and completely, as they were vested in the said Georgia Railroad Company.

SEC. 15. And be it further enacted, That the persons and property of the stockholders for the time being of the said Georgia Railroad and Banking Company, shall be pledged and bound in proportion to the amount of shares held by each, for the ultimate redemption of the bills or notes issued by and from said Company, in the same manner as in common commercial cases or simple actions of debt.

SEC. 16. And be it further enacted by the authority aforesaid, That no exclusive privilege or right of road, extended to the corporation by the Act of which this is amendatory, shall prevent the State from granting a charter to any Company that may hereafter apply for a Railroad to run from Macon to the Tennessee State line; and from granting any charter or charters to construct any Road to cross said Road, at any point west of Eatonton, or Madison, or Athens.

(3) Act approved December 25, 1837, Georgia Laws 1837, p. 212

WHEREAS, By an Act entitled "An Act to authorize the construction of a Railroad communication from the Tennessee line, near the Tennessee river, to the point on the southeastern bank of the Chattahoochee river; mostly eligible for running branch roads, thence to Athens, Madian, Milledgeville, Forsyth and Columbus, and to appropriate monies therefor," encouragement is held out in the tenth section of said Act, for the construction of branch Railroads from the terminus of said State Railroad, on the Chattahoochee river, to the several towns of Athens, Madison, Milledgeville, Forsyth and Columbus:

AND WHEREAS, in pursuance of the views of said Act, the Monroe Railroad Company, and the Chattahoochee Railroad Companies have obtained the privilege, by acts of the Legislature, to connect their roads with said State Railroad;

Now, for the purpose of extending a like privilege to the Georgia Railroad and Banking Company, to continue their Road from the town of Madison, to pass through or near the town of Covington, to the said State Railroad, on the Chattahoochee river:

SEC. 1. Be it enacted, etc., That the said Georgia Railroad and Banking Company shall have the right, and they are hereby authorized and empowered to continue their Railroad from the town of Madison, in Morgan County, to pass through or near Covington, in the County of Newton, to connect with and join the Railroad, about to be constructed by the State, from the Tennessee line, near the Tennessee river, to the southeast bank of the Chattahoochee river, as contemplated by the Act recited in the foregoing preamble, and for that purpose the said Georgia Railroad and Banking Company shall have all the powers and privileges, rights and immunities in the construction of said branch from Madison, as aforesaid, to the said State Railroad, as are contained in the several acts heretofore passed, and now of force, constituting the charter of the Georgia Railroad and Banking Company, as fully as if the said continuation . had been originally a part of the Georgia Railroad, and the said acts shall extend to and regulate the construction of said extended road, hereby authorized to be constructed, in the same

manner, and to the same extent, and for the same purposes and uses, as the same have been used and applied to the Georgia Railroad and its branch from the city of Augusta to the said town of Madison.

- (4) Act approved December 20, 1849, Georgia Laws 1849, p. 239.
- SEC. 1. Be it enacted by the Senate and House of Representatives of the State of Georgia in General Assembly met, and it is hereby enacted by the authority of the same, That the Georgia Railroad and Banking Company shall be allowed to increase their capital to a sum not exceeding five million dollars, upon such terms, limitations and conditions as the stockholders thereof, in Convention, shall determine: Provided, always, that the banking capital of said Company shall not be increase beyond the amount now authorized by their charter, namely, one million of dollars.
 - granted to the Georgia Railroad and Banking Company of constructing a branch of their road to Washington, in the County of Wilkes, be and the same is hereby revived and authorized to be exercised by said Company: Provided, That the amount of the increased stock of said Company shall not be exempted from taxation, as is secured to the present stock by the latter clause of the 15th section of the charter of said Company, but shall be subject to such tax as the Legislature may hereafter impose.
 - (5) Act approved December 11, 1858, Georgia Laws 1858, p. 66.
 - SEC. 1. Be it enacted, That the Georgia Railroad and Banking Company be and they are hereby authorized and empowered to extend the Eatonton Branch of their road either from

Greensboro or Madison, or from any point between those places, to the town of Eatonton, and to increase the capital stock of said Company to an amount sufficient for that purpose. wit hall the powers and privileges, rights and immunities contained in the existing charter: Provided, nothing herein contained shall be construed to authorize said Company to make any increase of its banking capital: And provided also, that such additional stock as shall be allowed under this Act shall be subject to such rate of taxation as the Legislature may from time to time assess, either directly or through the Executive of the State, such rate of taxation never to exceed that put upon the property of the people of this State, and this reserved right to tax the additional stock authorized under this Act in no case nor under any circumstances to be construed to authorize any incres of rate of taxation upon any other stock or property connected with said Company other than the additional stock allowed by this Act.

. . . .

(6) Act approved October 5, 1868, Georgia Laws 1868, p. 147.

Whereas, In the original charter of said Georgia Railroad and Banking Company (then known as the Georgia Railroad Company), it is provided that said Company shall have the power to continue the Athens Branch towards any point which may be agreed upon on the Tennessee river, and by the amended charter of said Company, passed in December, 1835, it is provided that the continuation of said Road beyond Athens, so as to connect with the Cincinnati Road, shall be steadily prosecuted so soon as the Company shall have satisfactory evidence that the said connection can be formed. And whereas, reasonable hopes are now entertained that said Cincinnati Road will be finished to the town of Clayton at no distant day:

SEC. 1. Be it, therefore, enacted by the Legislature of the State of Georgia, in General Assembly met, That the Georgia Railroad and Banking Company have the power to extend their Road from or near the city of Athens to the town of Clayton, in Rabun County, and for that purpose the said Company shall

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have and enjoy all the powers and privileges of the original charter and amendments.

SEC. 2. For the purposes stated in the above section, the said Company may increase its capital to such forms and upon such terms as the Board of Directors may determine: Provided, said increase shall not exceed two million dollars.

- II. Laws providing for the taxation of railroads and remedies of taxpayer.
- (1) Act approved February 1, 1850, Georgia Laws 1849, p. 378.
- AN ACT—Supplementary to the General Tax Laws, and to Tax Certain Property therein mentioned which has been heretofore Exempted from Taxation.
- SEC. 1. Be it enacted by the Senate and House of Representatives of the State of Georgia, in General Assembly met, That the President of the Georgia Railroad shall, on or before the thirty-first day of December, 1850, pay into the Treasury of this State, as a tax for the year 1850, on oath, one-half of one per cent, on the next annual income of the stock of said Road and its branches, under the penalty of double tax for his refusal or neglect to do so, to be collected by execution to be issued by the Treasurer.
 - SEC. 2. And be it further enacted, That the increase of capital of the Georgia Railroad and Banking Company, authorized by the Act of the present session of the General Assembly, be and the same is hereby taxed thirty-one and a quarter cents on every hundred dollars worth.
 - SEC. 5. And be it further enacted, That each and every of the Presidents of the aforesaid Railroad Companies shall make like payments on the thirty-first day of December in each and every year hereafter, until this Act shall be repealed: Provided,

That no banking capital employed by the Georgia Railroad and Banking Company, and the Central Railroad and Banking Company, shall, by any construction of this Act, be exempt from future taxation, at the discretion of the Legislature, and the tax on net profits only be on the net profits of the Railroad.

(2) Act approved February 28, 1874, Georgia Laws, p. 107, as amended and now codified in Code Sections 92-2602, 92-2603, and 92-2604.

"92-2602. (1032) Presidents to make returns.—The presidents of all the railroad companies, including street railroads. dummy railroads, and electric railroads in this State shall be required to return on oath, annually, to the Comptroller General, the value of the property of their respective companies, without deducting their indebtedness; each class or species of property to be separately named and valued, so far as the same may be practicable, to be taxed as other property of the people of the State; and said returns shall be made under the same regulations provided by law for the returns of officers of other incorporated companies, which are required by law to be made to the Comptroller General: Provided, that the said railroads shall be taxable for city purposes as other property is taxed for city purposes, and any law making railroad companies taxable by counties will be applicable, to street railroad companies of every character. (Acts 1874, p. 107; 1889, p. 36.)

"92-2603. (1033) Presidents to pay taxes assessed.—Said presidents shall pay to the Comptroller General the taxes assessed upon the property of said railroad companies; and on failure to make the returns required by the preceding section, or on failure to pay the taxes so assessed, the Comptroller General shall proceed to enforce the collection of the same in the manner provided by law for the enforcement of taxes against other incorporated companies. (Acts 1874, p. 107.)

"92-2604. (1034) Illegality to resist tax; venue,—If any railroad company affected by the preceding sections desires to resist the collection of the tax therein provided for, said company through its proper officer may, after making the

return required in section 92-2602, and after paying the tax levied on such corporation and continuing to pay the same while the question of its liability herein is undetermined, resist the collection of the tax above provided for, by filing an affidavit of illegality to the execution or other process issued by the Comptroller General, stating fully and distinctly the grounds of resistance, which shall be returnable to the superior court of Fulton County, to be there determined as other illegalities; the same to have precedence of all cases in said court as to time of hearing, and with the same right of motions for new trial and writs of error as in other cases of illegality, in which case the Comptroller General shall be represented by the Attorney General of the State. If the grounds of such illegality are not sustained, the Comptroller General shall, after crediting the process aforesaid with the amount paid, proceed to collect the residue due under the provisions aforesaid; and if, at any time during the pendency of any litigation herein provided for, the said corporation shall fail to pay the tax required to be paid as a condition of hearing, said illegality shall be dismissed, and no second affidavit of illegality shall be allowed. Said illegality may be amended as other affidavits of illegality, and shall always be accompanied by good bond and security for the payment of the tax execution issued by the Comptroller General. (Acts 1874, p. 107; 1931, pp. 7, 38.)"

(3) Act approved February 22, 1877, Georgia Laws 1877, p. 126, as amended and as now codified in Sections 92-5904, 92-6001 and 92-6002 of the Georgia Code of 1933.

"92-5904. (1050) Returns to be itemized.—When corporations, companies, persons or agencies are required by law to make returns of property, or gross receipts, or business, or income, gross, annual, net, or any other kind, or any other return, to the Comptroller General for taxation, such return shall contain an itemized statement of property, each class or species to be separately named and valued, or an itemized account of gross receipts, or business, or income as above

defined, or other matters required to be returned, and in case of net income only, an itemized account of gross receipts and expenditures, to show how the income returned is ascertained. (Acts. 1877, p. 126; 1905, p. 68)."

"52-6001. (1050). Assessment to correct returns.—The Comptroller general shall carefully scrutinize the returns made to him, and if in his judgment the property embraced therein is returned below its value, or the return is false in any particular, or in any wise contrary to law, he shall within 60 days thereafter correct the same and assess the value, from any information he can obtain. (Acts 1877, p. 126; 1905, p. 68)."

"92-6002. (1045, 1050) Arbitration of assessments to correct returns.-In all cases of assessment or correction of returns, as provided in section 92-6001, the officer or person making such returns shall receive notice and, if dissatisfied with the assessment or correction of returns, shall have the privilege, within 20 days after such notice, to refer the question of the true value or amount to arbitrators—one chosen by himself and one by the Comptroller General-who, in case of disagreement, may choose an umpire. If the two arbitrators, disagreeing, fail to select an umpire within 30 days after receiving notice of their appointment, the Governor shall appoint two arbitrators, who, with the arbitrator selected by the officer or person making the returns, shall determine the question as to the amount or value. Every arbitrator or umpire chosen hereunder shall be a citizen of Georgia. The award shall be made within 30 days from the appointment of the umpire or, in case no umpire is chosen, within 30 days from the appointment of arbitrators by the Governor; and their award shall be final. (Acts 1877, p. 126; 1878-9, p. 166; 1905, p. 68.)"

⁽⁴⁾ Act approved October 16, 1889, Georgia Laws 1889, p. 29, now codified in Code Sections 92-2701, 92-2702, 92-2703, 92-2704, 92-2705, 92-2706.

[&]quot;92-2701. (1036) Railroads to report to Comptroller General annually.—On or before the first day of March each railroad

company in this State shall make an annual return as of January first preceding to the Comptroller General, for the purposes of county taxation in each of the counties through which said road runs, in the following manner: Said return shall be under the oath of the president or other chief executive officer, and shall show the following facts as they existed on the first day of January preceding, to-wit: first, the aggregate value of the whole property of said railroad company; second, the value of the real estate and track-bed of said company; third the value of the rolling stock and all other personal property of said company; fourth, the value of the company's property in each county through which it runs: (Acts 1889, p. 29; Const., Art. VII, Sec. II, Par. VI (§2-5007).)

"92-2702. (1037) Taxation by each county through which railroad passes.—Whenever the amount of the tax levy of any county through which the said railroad runs is assessed by the authority of such county, the ordinary or other authority having charge of county affairs shall certify the same and transmit the certificate to the Comptroller General; and the property of such railroad company shall be subject to taxation in each county through which the road passes, to the same extent and in the same manner that all other property is taxed, in the manner hereafter set out. (Acts 1889, p. 29.)

"92-2703. (1038) Property assessed.—Whenever such certificate is received by the Comptroller General, he shall proceed to assess the amount of each railroad company's property, in each of said counties, in the following manner: First, it shall be assessed upon the property located in each county, upon the basis of the value given by the returns. Second, the amount of tax to be assessed upon the rolling stock and other personal property is as follows: As the value of the property located in the particular county is to the value of the whole property, real and personal, of the said company, such shall be the amount of rolling stock and other personal property to be distributed for taxing purposes to such county. The value of the property located in the county and the share of the rolling

stock and personal property thus ascertained, and apportioned to each of such counties, shall be the amount to be taxed to the extent of the assessment in each county. (Acts 1889, p. 29.)

"92-2704 (1039) Taxes due county paid tax collector.—
Whenever the Comptroller General shall ascertain and levy in
the man ar specified the amount of tax due by such company
to each of such counties, it shall be his duty at once to notify
the president and treasurer of such railroad company of the
amount due in each of said counties for county taxes of said
railroads, and each and every road is required, on or before
December 20th in each year, to pay to the tax collector of each
county through which the railroad runs the amount stated by
the Comptroller General as the tax due to such county. (Acts
1889, p. 29; 1917, p. 195.)

"92-2705. (1040) Manner of issuing executions—If any railroad company shall refuse to pay the amount thus ascertained and due by it to the tax collector of any county to which the same is due and payable, it shall be the duty of the Comptroller General to issue and execution in the name of the State against such railroad company for the same, to be issued, levied, and returned in the same manner as tax executions are issued for State taxes due in the State by said companies. (Acts 1889, p. 29.)

"92-2706. (1041) Affidavit of illegality to resist tax.—If any railroad company desires to dispute its liability to such county tax, it may do so by an affidavit of illegality, to be made by the president of said railroad or other officer thereof having knowledge of the facts in the same manner as other affidavits of illegality are made, and shall be returned for trial to the superior court of the county where such tax is claimed to be owing and where it is sought to be collected, where such cases shall be given precedence for trial over all other cases, except tax cases in which the State shall be a party. (Acts 1889, p. 29; 1916, p. 34; 1927, p. 136.)"

(5) Act approved December 24, 1890, Georgia Laws 1890-1891, p. 152, codified in Code Sections 92-2801, 92-2802, and 92-2804.

"92-2801. (872) Property of railroads subject to municipal taxation.—All property, real and personal, belonging to railroad companies in this State, which is within the limits of any municipal corporation, shall be subject to taxation by the said municipality as fully and as completely as is the property of other corporations within the limits, and it is the duty of the municipal authorities to cause property belonging to a railroad company to pay its proper and just share of municipal taxes. (Acts 1890-1, p. 152.)

"92-2802. (873) Return to show what.—In addition to the facts required to be shown by Chapter 92-27, providing a system of railroad property taxation in each of the counties, every railroad company in this State shall, at the time of making the returns provided for in said Chapter, show the value of the company's property in each incorporated city or town through which it runs. (Acts 1890-1, p. 152.)

"92-2804. (875) County tax law applicable.—All other provisions of Chapter 92-27 are made applicable to the assessment and collection of taxes by municipalities upon the property of railroads located in such municipalities, and upon the rolling stock and other personal property. (Acts 1890-1, p. 152.)"

(6) Act approved August 14, 1908, now codified in Sec. 92-6005, Code of 1933.

"92-6005 (1054) Returns of railroad companies for county, municipal, and school tax purposes.—The returns of railroad companies for purposes of county and municipal and school taxation shall be subject to the same inspection, objection and assessment by the Comptroller General, and arbitration, as is provided by law for returns of such property for purposes of State taxation (Acts 1908, p. 24)."

(7) Act approved July 31, 1918, now codified in Chapter 92-61 of the Code of 1933.

"92-6101. Undervaluation of property or failure to return. -When the owner of property has omitted to return the same for taxation at the time and for the years the return should have been made, or, having returned his property or part of same, has grossly undervalued the property returned, or his property has been assessed for taxation at a figure grossly below its true value, such owner, or, if dead, his personal representative or representatives, shall return the property for taxation for each year he is delinquent, whether delinquency results from failure to return or from gross undervaluation, either by the delinquent or by assessors, said return to be made under the same laws, rules and regulations as existed during the year of said default, or the year in which said property was returned or assessed for taxation at figures grossly below its true value: Provided, that no lien for such taxes shall be enforced against any specific property which has been previously alienated or incumbered, and is in the hands of innocent holders without notice. (Acts 1918, p. 232.)

"92-6102. Notice and demand by Comptroller to file return.

—When the owner of said property, or, if dead, his personal representative or representatives; refuses or fails to make returns in cases of property which should have been returned to the Comptroller General, the Comptroller General shall notify, in writing, such owner or his personal representative or representatives of his delinquency, demanding that a return shall be made thereof within 20 days. (Acts 1918, p. 233.)

"92-6103. (1136) Assessment of value by Comptroller; issue of excessiveness.—If the delinquent or his personal representative or representatives, as provided for in section 92-6102, refuses or fails to return such property after the notice given, or returns it below what the Comptroller General deems its value, the Comptroller General shall assess such property for taxation for State, county, or municipal and school purposes, from the best information he can obtain as to its value, for the

current year, and for each year in default, and notify such delinquent or his personal representative or representatives of the valuation, which valuation shall be final, unless the person or persons so notified shall raise the question that it is excessive, in which event the further procedure shall be as provided by section 92-6001. (Acts. 1918, p. 233)

"92-6104. Issue of taxability, where tried.—If the delinquent under section 92-6102 disputes the taxability of such property, he may raise the question by petition in equity in the superior court of Fulton county, and if such delinquent is dead, his personal representative or representatives shall have the same right. (Acts. 1918, p. 234.)"

(8) Act approved August 25, 1927, Georgia Laws 1927, p. 97, new codified in Sec. 92-5902 of the Code of 1933.

"92-5902. Returns by public utilities made to whom.—All persons or companies owning or operating railroads... shall be required to make annual tax returns of all property located in this State to the Comptroller General; and the laws now in force providing for taxation of railroads in this State shall be applicable to the assessment of taxes on the businesses above stated."

(9) Act approved March 30, 1937, Georgia Laws 1937, p. 497, codified in Sec. 92-5811 of the Code of 1933.

"92-5811. Unreturned and undervalued personal property to be assessed.—Where the owner of such property has omitted to return such property for taxation at the time and for the year that return should have been made, or, having returned such property, has grossly undervalued same, the Commission through its deputies or agents shall require such delinquent or defaulting taxpayer to make a proper return, or return the omitted property, and the same shall be assessed in the manner and method prescribed in Chapter 92-61. (Acts 1937, p. 497.)"

(10) Reorganization Act approved January 3, 1938, Georgia Laws Extra Session 1937-1938, p. 77.

"Section 4. The State Revenue Commissioner... is hereby vested with all the powers and authority and required to perform all the duties relating to matters of petroleum inspection, taxation and licenses heretofore vested in the Comptroller General (except licenses to insurance companies and their agents) and he is also vested with all the powers and authority and required to perform all the duties relating to taxation and licenses heretofore vested in any state administrative officer or State Department, but the powers and authorities by this section vested in the State Revenue Commissioner shall be the powers and authorities of said officers as modified, limited and enlarged by this Act."

(Sections 18 through 23 create a Board of Tax Appeals and provide for its procedure.)

"Section 24. Repeal of Certain Code Sections.—The following provision of Title 92 ("Public Revenue") of the Georgia Code of 1933 are hereby repealed. Sections 92-6001-92-6007, inclusive, relating to arbitration of assessments or correction of returns made by the Comptroller General, and 92-7004-92-7006, inclusive, relating to arbitration of State Revenue Commission's equalization of County assessments.

"Section 34. Refunds.

"(b) Procedure for Granting. In any case in which it shall be determined that an arroneous or illegal collection of tax or license has been made by the Commissioner, the taxpayer from whom such tax or license was collected may file a claim for refund with the said Commissioner in writing and in such form and containing such information as the Commissioner may require, to include a summary statement of the grounds upon which the taxpayer relies. In the event the taxpayer desires a

conference or hearing before the Commissioner in connection with any claim for refund, he shall so specify in writing in the claim, and if the claim conforms with the requirements of this section the said Commissioner shall grant such a conference at a time he shall specify. The Commissioner shall consider information contained in taxpayer's claims for refund and such other information as may be available and shall approve or disapprove the taxpayer's claim and notify such taxpayer of his action. In the eyent any claim for refund is approved, the Commissioner shall forthwith proceed under subsection (a) of this section to give effect to the terms thereof. Provided, further, that the taxpayer whose claim for refund is denied by the Commissioner under the terms of this Act, shall have the right to sue for refund in the Superior Court of the County in which said taxpayer would have a right to appeal from a judgment by the Board of Tax Appeals, as in this Act, provided.

"Section 44. Appeal from the Commissioner's Findings." The Commissioner's assessment shall not be reviewed except by the procedure hereinafter provided; no trial court shall have jurisdiction of proceedings to question such assessments except as in this Act provided. If any taxpayer shall be aggrieved by any assessment which the Commissioner may make, he may, within thirty (30) days from the date when the assessment is finally made and notice thereof given to the taxpayer file with the Board of Tax Appeals petition for review. The request for review may be accompanied by a copy of the taxpayer's return as filed with the Commissioner and of any special accounting or other report thereon which the Commissioner may have made or required to be made. Both the Commissioner and the taxpayer shall have the right to introduce before the Board of Tax Appeals any evidence or data which said Board may rule to be pertinent or relevant, whether it was introduced originally before the Commissioner or not. The filing of any such petition shall not abate penalties for nonpayment unless such appeal is finally decided in favor of

the taxpayer, nor shall it stay the right of the Commissioner to collect the tax which is admitted to be due, by any methods available to him under the law, unless the taxpayer shall furnish security of a kind and in amount satisfactory to the Commissioner. Where the Commissioner is required by law to certify to any county or municipal government of this State all or any part of an assessment or tax against any taxpayer, and the taxpayer disputes the correctness of said assessment or tax as determined by the Commissioner, the Commissioner is hereby directed to certify to said county and municipal government the value of the property of the taxpayer and/or the tax admitted by him in his return to be due, and after a final determination of the balance of said assessment or tax in dispute shall make a supplemental certification to said counties and municipal governments as may be finally determined. shall be the duty of the taxpayer to pay, as required by law, any . taxes that may be assessed by the State, county or municipal governments, both upon the original value as shown in his return as well as upon its supplemental value that may finally be determined as in this Act provided.

"Section 45. Review of Board's decisions. Jurisdiction of the Superior Courts. The findings of the Board of Tax Appeals shall not be final; but either party may appeal-from any order, ruling, or finding of the said Board to the Superior Court of the county of the residence of the taxpayer unless the taxpayer be a railroad or other public service corporation or non-resident, in which even the appeal of either party shall be to the Superior Court of the County in which is located its principal place of doing business, or in which the chief or highest corporate officer, resident in the State, maintains his office. The appeal and necessary records shall be certified and transmitted by the Chairman of the Board and shall be filed with the Clerk of the Superior Court within thirty (30) days from the date of judgment by the Board. The procedure provided by law for applying for and granting appeal from the Court of Ordinary to the Superior Court shall apply as far as suitable to the appeal authorized herein, except that the appeal authorized

herein may be filed within fifteen (15) days from the date of judgment by the Board.

"Before the Superior Court shall have jurisdiction to entertain such appeal filed by any aggrieved taxpayer, such taxpayer shall file with the Clerk of the Superior Court a writing whereby such taxpayer shall agree to pay on the date or dates the same shall become due all axes for which such taxpayer has admitted liability and shall within thirty (30) days from the date of judgment by the Board file with the Clerk of the Superior Court, except where appellant owns real property in Georgia, the value of which is in excess of the amount of the tax in dispute, a bond in amount satisfactory to such Clerk or other security in amount satisfactory to such Clerk condi-· tioned to pay any tax over and above that which the taxpayer has admitted liability for which shall be found to be due by a final judgment of court, together with interest and costs. It shall be ground for dismissal of the appeal if the taxpayer fails to pay all taxes admittedly owed upon the due date or dates as now or hereafter provided by law.

"if the final judgment of court places upon the taxpayer any tax liability which he has not already paid, he shall pay the same on the due date or dates now or hereafter fixed by law if the tax or any of same has not become due on the date of said final judgment of court. And if the tax or any of same has already become due at the time of final judgment of court, the taxpayer shall immediately pay the tax or so much thereof as has already become due, with interest, and shall pay the court costs, in the event the final judgment of court is adverse to the taxpayer, no matter whether the tax or any part of same has or has not become due at the time of said final judgment of court."

(11) Act approved February 17, 1943, Georgia Laws 1943, p. 204.

"Section 2. That said Act of January 3, 1938, be, and the same is hereby further amended by striking and repealing all

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Sections 18, 19, 20, 21, 22, 23 and 24 of Chapter III thereof, which said sections create a State Board of Tax Appeals, and provide for the review of decisions of the State Revenue Commissioner, and substituting in lieu thereof new sections to be numbered section 18, section 19, and section 20, which shall read as follows:

"'Section 18. Except as otherwise provided by this Act, all matters, cases, claims and controversies, of whatsoever nature arising in the administration of the revenue laws, or in the exercise of the jurisdiction of the State Revenue Commissioner or the Department of Revenue, as conferred by this act, shallbe for determination by the State Revenue Commissioner, subject to review by the courts as provided for by Section 45 of Chapter IV of this Act. The effect of this section shall be that, except as hereinafter provided, all final rulings, orders and judgments of the State Revenue Commissioner shall be subject to appeal and review under Section 45 of this act in the same manner, under the same procedure, and as fully, as if same had been considered and passed upon by the Board of Tax Appeals. Any such appeal from a final ruling, order, or judgment of the State Revenue Commissioner shall be entered within the time prescribd by Section 45 of the Act; Provided, however, that nothing herein contained, and no provision of this Act, shall be construed to deprive a taxpayer against whom an execution for taxes has been issued under an assessment by the State Revenue Commissioner of the right to resist efforcement of the same by affidavit of illegality.

"All petitions for review filed and now pending before the Board of Tax Appeals shall be and they are hereby declared to be in the same position as if the ruling, order, finding or assessment of the Commissioner therein complained of and sought to be reviewed had been affirmed by the Board of Tax Appeals; and all such rulings, orders, findings or assessments now pending for review before the Board of Tax Appeals shall be final and conclusive unless the taxpay or who filed said petition for review shall, within thirty (30) days from the date of the passage of this Act, appeal said ruling, order, finding or assess-

ment to the Superior Court in the manner provided by Code Section 92-8446, except that in the case of a foreign corporation domesticated in Georgia the appeal shall be made within the time herein prescribed to the Superior Court of the County in which such foreign corporation was domesticated in Georgia.'

"'Section 19. The provisions of the foregoing section with reference to reviewing assessments of the State Revenue Commission shall not apply to assessments for ad valorem taxation against any person, corporation or company which was required by Chapter 92-59 of the Code of 1933 to return his or its property for ad valorem taxation to the Comptroller General and is now required by such chapter and this Act of January 3, 1938, to make such returns to the State Revenue Commissioner. The State Revenue Commissioner shall carefully scrutinize such returns made to him, and if in his judgment the property embraced therein is returned below its value or the return is false in any particular, or in any wise contrary to law, he shall, within sixty days thereafter, correct the same and assess the value, from any information available. If any such person, corporation or company shall be dissatisfied with the assessment or correction of such returns as made by the State Revenue Commissioner or the Department of Revenue, such taxpayer shall have the privilege, within twenty days after notice of such assessment and correction, to refer the question of true value or amount to arbitrators as provided . for by Chapter 92-60 of the Code of Georgia of 1933. Such arbitrators shall consist of one chosen by the taxpayer and one chosen by the Governor. If the arbitrators i'us chosen shall be in disagreement, they shall choose an umpire. If such arbitrators disagree and fail to select an umpire within thirty days after receiving notice of their appointment, the Chief Justice of the Supreme Court of Georgia shall select an umpire. Every arbitrator or umpire chosen hereunder shall be a citizen of Goorgia. The award shall be made by the arbitrators or by the arbitrators and the umpire, as the case may be, within thirty days from the appointment or selection of such umpire. The decision and award of the arbitrators or of the arbitrators and the umpire shall be subject to appeal and review in the same manner as decisions and orders of the tate Board of Tax Appeals were subject to appeal and review under the terms of Section 45 of This Act.'

"'Section 20. Sections 92-7004 to 92-7006 of the Code of Georgia of 1933, which relate to arbitration of State Revenue Commission's equalization of county assessments are hereby repealed. Chapter 92-60 (Section 92-6001 to 92-6007) of the Code of Georgia of 1933, as modified by the provisions of the foregoing Sectional 9, shall continue and remain in full force and effect as if fully set forth herein.'

"Section 3. All laws and parts of laws in conflict with this "Act are hereby repealed."

- III. Constitution provision attempting to revoke tax exemptions.
- (1) Article I, Section 3, Paragraph II of the Constitution of Georgia as amended in 1945, Georgia Laws 1945, p. 14.

"Paragraph II: Revocation of tax exemptions. All exemptions from taxation heretofore granted in corporate charters are declared to be henceforth null and void."

- IV. Constitutional and statutory provision authorizing Attorney General to represent State in prior litigation, as set out in Georgia Code of 1895.
- (1) Constitution of Georgia of 1877, Article VII, Section 10,.
 Paragraph II, Code Sec. 5860(a).

"Section 5860(a).

"It shall be the duty of the attorney-general to act as the legal adviser of the Executive Department to represent the

State in the Supreme Court in all capital felonies, and in all civil and criminal cases in any court when required by the Governor, and to perform such other services as shall be required of him by law."

(2) Code provisions, Georgia Code of 1895.

"Sec. 23. When any suit is instituted against the State, or against any person, in the result of which the State has an interest, under pretense of any claim inconsistent with its sovereignty, jurisdiction or rights, the Governor shall, in his discretion, provide for the defense of such suit, unless otherwise specially provided for."

"Section 220. It shall be the duty of the Attorney-General ... to represent the State . . . in all civil and criminal cases in any court when required by the Governor."

"Sec. 123. He (the Governor) shall have general supervision over all property of the State, with power to make all necessary regulations for the protection thereof, when not otherwise provided for."

"Sec. 126. Whenever the Governor, after consulting with the attorney-general, or without, if there is no such officer, shall deem it proper to institute a suit for the recover, of a debt due the State or money or property belonging to the State, he is authorized and required to institute such suit in the proper court of this State, with the same rights as any citizen, and to require the aid of the attorney-general to begin and carry on such suits where practicable, and if not, some other suitable and competent attorney, on such terms, as to compensation, as he may agree upon, but the fees of such attorney shall be conditional."

Sec. 187. Whenever the Governor has trustworthy information that the State Treasurer or comptroller-general is insane, or has absconded, or grossly neglects his duties, or is guilty of conduct plainly violative of his duties, or demeans himself in office to the hazard of the public funds or credit of the

State, the Governor shall suspend said treasurer, or comptroller-general, as the case may be, and report his reasons for such suspension to the General Assembly. Said suspension shall continue until the General Assembly shall otherwise direct."

"Sec. 139. The Governor may suspend the collection of the taxes, or any part thereof, due the State, until the meeting of the next General Assembly, but no longer; nor shall he otherwise interfere with the collection thereof."

"Sec. 222. It is in the discretion of the Comptroller General to require the Attorney General, when the services of a Solicitor General are necessary in collecting or securing any claim of the State, in any part of the State; either to command the services of said Attorney General in any and all such cases, or the Solicitor Generals in their respective circuits."

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IN THE

CHARLES ELMORE CROPE DE

Supreme Court of The United States

October Term, 1949 / 750

NO. *** *

GEORGIA RAILROAD & BANKING CO.,
Appellant

VS.

CHARLES D. REDWINE, State Revenue Commissioner,
Appellee

REPLY BRIEF FOR APPELLANT

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Supreme Court of The United States

October Term, 1949

NO. 454

GEORGIA RAILROAD & BANKING CO., Appellant

VS.

CHARLES D. REDWINE, State Revenue Commissioner,
Appellee

REPLY BRIEF FOR APPELLANT

Appellee Is Inconsistent.

Appellee argues that this action cannot be maintained because it is against the State of Georgia. At the same time he argues that the State is not bound by the decree in the Wright case because the prior action was against Wright as an individual wrongdoer and not against the State. Yet the two actions are in substantially the same form. Both of these contradictory positions are necessary to sustain the judgment below. Appellee does not attempt to reconcile them.

Allen Case, Not Ayers Case Controlling.

Appellee says (his brief, p. 11): "... the distinction between the Allen case and the Ayers case rests on the familiar principle that when authority to act is exceeded, action by the officer beyond his authority is personal action only.

"... On the other hand, the authority of the Attorney General to maintain a suit in behalf of the State is not limited to

those suits where the State is entitled to prevail."

As Appellee says, the reason that the acts of the Attorney General in the Ayers case were held to be within his authority and not to be enjoined was that his authority to bring suit on behalf of the State was not limited to those acts in which the State would necessarily prevail.

But this Court has held, in the Wright case and other cases, that the Revenue Commissioner cannot be constitutionally authorized to seize the property of Appellant for these taxes. Therefore, his threatened acts are beyond his authority and, under Appellee's own argument, may be enjoined.

It may be that if the Commissioner, instead of attempting to seize Appellant's property, had brought suit to collect these taxes, Appellant could not have enjoined such suit (but see the Gunter case, 200 U. S. 273). In any event, Appellant would not have attempted to enjoin such suit, for it could have set up all its rights in such action, and that is all it is seeking. Appellee, on the other hand, is trying to force Appellant to pay these taxes without any opportunity for hearing.

Therefore, under Appellee's own argument, this case falls under the Allen case and not the Ayers case.

Wright Case Not Action for Declaratory Judgment.

Appellee says (his brief, p. 18) the Wright case was action for declaratory judgment. An examination of the record will show that such was not the case. The complaint prayed for injunction. The decree granted a permanent injunction. The fact that the decree stated the conclusions on which the injunction was based did not convert the case into an action for declaratory judgment. If it had, this Court would have reversed, rather than affirmed, for this Court certainly knew that declaratory judgment was not then proper. Moreover, even if the decree had been erroneous in this regard, it certainly would not have been totally void.

Appellee Bound by Prior Decree.

Appellee indicates that we contend that the Governor or the Attorney General had authority to consent to a suit against the State, as for example, a suit for a money judgment to be paid out of the State Treasury. Such is not our contention.

It is our contention that when a state officer is sued as a wrongdoer the State may, if it elects, leave the officer to fend for himself. In such case judgment against the officer will be against him individually and will not bind the State.

But the State may, if it sees fit, ratify the acts of the officer and assume the defense of the action in order to protect the claims of the State and to secure an adjudication of such claims. If so, the State is bound by the decree as fully and to the same extent as if it were a party, under the familiar principle that a person act a party to the record who, to protect some interest of his own, openly assumes the defense of a suit is bound by the decree as fully and to the same extent as if he has been a party to the record.

Such was the holding of this Court in the Gunter case (200 U. S. 273).

In the Gunter. Esse this Court did not hold that the prior Pegues case was against the State of South Carolina. On the contrary the Court made it clear that such suit was not originally against the State:

"In view of the prohibitions of the 11th Amendment to the Constitution of the United States, The State, without its consent, may not be sued by an individual in a Circuit Court of the United States.

forcing a tax alleged to be in violation of the Constitution of the United States is not a suit against a State within the prohibitions of the 11th Amendment." (p. 283.)

What this Court held in the Gunter case was that when the

State of South Carolina authorized its officials to defend the Pegues case on behalf of the State, the State of South Carolina became bound as fully as if it had originally been a party.

And what we contend in this case is that the Comptroller General, the Governor and the Attorney General were fully authorized, and in fact required, by the law of Georgia to defend the Wright case on behalf of the State. We submit that the Georgia statutes quoted in our original brief are in all material respects the same as the South Carolina statutes involved in the Gunter case.

Certainly the Governor and the Attorney General would have been authorized under the Georgia law to have brought action against Appellant to recover the tax. If they had, certainly the State of Georgia would have been bound by judgment in such action. There is no reason in law or in public policy why they were not equally authorized to intervene and assume the defense of, and seek an adjudication in, an action against the Comptroller in the Circuit Court of the United States. They recognized the obvious fact that the issue would ultimately be decided by this Court and that the most expeditious method of getting the case before this Court was in the action in the Circuit Court with a direct appeal to this Court.

Appellee does not argue, or at least does not cite any authority, that a State or its officials may ignore a final decree and permanent injunction of a federal court, affirmed by this Court, on the grounds that the State might have, but did not, plead immunity to suit in the action in which the decree is rendered. Such argument could not be made in view of the cases cited in our original brief (p. 11) holding that a final judgment of the Federal Court is valid and binding, although the District Court was without jurisdiction, and although the action might have been dismissed on motion of the defendant, or by the Court on its own motion, before the decree became final. Such final decree, as this Court has held, conclusively adjudicates that the Court had jurisdiction to render the decree just as it concludes every other question necessary to the decree.

Ford Motor Co. v. Department of Treasury, 323 U. S. 459, was a suit originally against the State asking a money judgment to be paid from the State Treasury and the question of immunity of the State from suit was raised in this Court before the decree became final.

14th Amendment Gives
Appellant Right to Enjoin.

Appellee concedes (his brief pp. 33, 39) that the 14th Amendment requires that Appellant have opportunity to contest the taxability of its property in some forum, and that if no other forum is provided, a Court of Equity should enjoin the collection of the tax on that ground alone.

Appellant has already been denied such hearing in the Court of Georgia, Musgrove v. Georgia Railroad & Banking Co., 204 Ga. 139.* If the judgment of the District Court dismissing this action is sustained, Appellant will be denied all opportunity for a hearing on the taxability of its property contrary to the 14th Amendment. Therefore, according to Appellee's own argument, the 14th Amendment requires that the judgment below be reversed and that the assessment be enjoined on this ground alone.

No Plain Remedy in Courts of Georgia.

The elaborate and ingenious argument of Appellee (his brief, pp. 33-40) on the remedies Appellant might have in the Courts of Georgia itself demonstrates that such remedies are not "plain" within the meaning of the Johnson Act.

As shown by the cases cited on page 32 of our original brief, this Court has held that the *Johnson Act* does not withdraw jurisdiction of the federal court unless the remedy in the state court is so plain and clear as not to admit of any reasonable doubt. This Court has held that where the state statutes are

^{*} In that case Appellant sought and prayed for an injunction. Appellee in his brief (p. 4) so concedes?

ambiguous or where such statutes are new and have not yet been construed by the highest court of the state, the remedy will not be said to be so plain as to deny the federal court of jurisdiction (our original brief, p. 32).

Appeal to Superior Court.

Appellee argues (his brief p. 33) that Appellant still has the right to appeal to the Superior Court from the assessment of the Commissioner as to taxability, although not as to valuation. Sec. 19 of the Act of 1938, as amended by the Act of 1943 (our original brief App. p. xxxiii) provides:

"The provisions of the foregoing section with reference to reviewing assessments of the State Revenue Commissioner shall not apply to assessments for ad valorem taxation against any person, corporation or company which was required by Chapter 92-59 of the Code of 1933 to return his or its property for ad valorem taxation to the Comptroller General."

The above provision says that the right of appeal shall not apply to any assessment for ad valorem taxation against railroads. It makes no exception as to taxability and draws no distinction between taxability and valuation. Clearly the right of appeal is not available.

Payment and Suit to Recover.

Appellee admits (his brief p. 36) that there is no method of recovering the part of the tax which would be paid to the counties and cities. Probably well over 85% of the tax claimed in this case would be paid to county and city tax collectors rather than the State.

He says, however, that if Appellant paid the tax claimed by the State and brought suit to recover that part of the tax Appellant could confidently rely on the counties and cities waiting until such test case was decided by this Court before making any effort to collect any other tax. The fact that the counties might, as a matter of grace, refrain from enforcing the tax against Appellant is not a remedy within the meaning of the Johnson Act.

Moreover, there is nothing in the history of this litigation to give any grounds for such confidence. The State and the several counties have tried in every way possible to force payment of this tax and to deny Appellant any opportunity to have its rights determined on their merits.

Appellee strenuously resisted our efforts to secure an injunction pending this appeal. There could have been no reason for resisting such injunction except the intention of the State and counties to proceed with the assessment and collection of the tax pending appeal if Appellee had been successful in persuading the District Court to deny such injunction. The District Court did deny injunction as to three miles between Camak and Warrenton, as to which the exemption may apply but which was not described in the original complaint. We requested Appellee to withhold assessment as to this part until this appeal could be determined. He summarily rejected our request, assessed the tax, and levied on property essential for railroad operations. Appellant, having no other recourse, has been forced to pay the tax on that part in order to prevent interruption of its railroad operation.

Affidavit of Illegality.

Appellee says (his brief p. 38) that we do not appear to take the position that the remedy of affidavit of illegality was repealed with respect to taxes assessed on behalf of counties and municipalities. We certainly intended to take such position. Such taxes are assessed and the execution issued by the Revenue Commissioner in the same manner as the taxes due the State. The "assessment" of county tax is by the Commissioner and not by the county. The state statute providing that the courts shall not have jurisdiction to question his assessment certainly applies to his assessment for county taxes as well as any other assessment.

Appellee himself recognizes that the assessment for county tax purposes is the same as any other assessment of the Commissioner, for he argues that the provisions for appeal from assessments of the Commissioner apply to such assessment for county taxes.

Appellee suggests (his brief, p. 37) that the Act approved August 28, 1931 (Georgia Laws 1931, p. 7, 33), codified in Sec. 92-7301 of the Georgia Code, gives the right of affidavit of illegality.

Sec. 82 of that Act provides, however;

"Sec. 82. All powers and functions heretofore imposed by law on the Comptroller General . . . are hereby, imposed and retained." (Ga. Laws 1931, p. 34.)

Therefore, the enforcement of ad valorem taxes against railroads was retained in the Comptroller and was not transferred to the Revenue Commission created by that Act, and the provision as to affidavit of illegality set out in that Act had no application to ad valorem taxes against railroads. The Comptroller General so ruled, as is set out in the editorial note under that section in the Annotated Code.

Moreover, that section, along with the other similar sections, were necessarily repealed by the Act of 1938 (our original brief, App. xxviii).

Our argument (original brief, p. 36) that to test the question by affidavit of illegality might require 310 executions and 310 affidavits of illegality returnable to 14 different courts was an additional reason why such remedy is not adequate or efficient, and was not intended as the only reason, as Appellee says (his brief p. 38).

Suit for Injunction in State Court.

Appellee argues (his brief p. 39) that Appellant could sue in equity in the Superior Court of Fulton County. The cases he cites, however, all arose before the passage of the Act approved January 3, 1938, Sec. 44 of which provides that no trial court

shall have jurisdiction to question the assessment of the Commissioner except as in the Act provided (Appendix to our original brief, p. xxix).

Appellee further argues that this section may be unconstitutional because contrary to the 14th Amendment. Certainly a remedy dependent upon having the State Court declare a state statute denying the remedy unconstitutional is not a "plain" remedy within the meaning of the Johnson Act.

In this connection the amici curiae in their brief (p. 46) flatly insist that the State of Georgia has denied to Appellant the right to sue for an injunction in the State Court. If counsel for the Appellee and for the amici curiae cannot agree on whether such remedy exists, it certainly cannot be said to be "plain".

Finally, Appellant has already tried and been denied an injunction in the State Court, Musgrove v. Georgia Railroad & Banking Co., 204 Ga. 139.

Contract Valid.

Appellee argues (his brief p. 40-47) that a State may not constitutionally enter into a contract of tax exemption and that such contract is contrary to the 14th Amendment. Both this Court and the Supreme Court of Georgia have repeatedly decided against this contention. To sustain Appellee in this regard would require the reversal of scores of decisions of this Court. We do not assume that this Court, on summary argument, desires reargument of questions settled by repeated decisions of this Court.

° Failure to Build All Lines Authorized.

The only case cited by either Appellee or counsel amici curiae which may appear to hold that a railroad may forfeit its contractual tax exemption by failure to complete all its lines is State v. Morgan, 28 La. 490, cited on p. 30 of the brief amici curiae. In that case the exemption was for a limited period of

ten years after the completion of the railroad within the state. The railroad was never completed. Yet it claimed exemption many years after the expiration of ten years from the time when it should have been completed. In other words, the railroad was attempting to convert a limited exemption of ten years into an indefinite and unlimited exemption by the simple expedient of never completing the railroad. Moreover, the case was actually decided on the ground that the railroad had been sold at foreclosure and the exemption did not carry through to the purchaser, and the case was affirmed by this Court on that ground only, Morgan v. Louisiana, 93 U.S. 217.

InBacon v. Texas, 163 U. S. 207, cited both by Appellee (his brief p. 49) and by amici curiae (his brief p. 29) as being strikingly similar, there was failure to comply with express conditions precedent to a grant of land. As pointed out in our original brief (p. 36), there certainly was no express condition in this case that the rail oad must complete all of the railroad that it had authority to build. On the contrary, as pointed out in our original brief, it is clearly evident that the legislature contemplated that Appellant would not build all of the railroad it might have been authorized to build and the legislature acquiesced in the failure to build the Eatonton branch and finally withdrew the right to build the Eatonton branch.

Moreover, this Court in the Bacon case actually decided only that the State Court had decided no Federal question and dismissed the writ of error.

Respectfully submitted,

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IN THE

CHARLES ELMORE CROPLEY

Supreme Court of The United States

October Term, 1950 1951

NO. ≰

GEORGIA RAILROAD & BANKING CO.,

Appellant,

VS.

CHARLES D. REDWINE, State Revenue Commissioner,
Appellee

MOTION TO TERMINATE THE CONTINUANCE
AND DECIDE THE APPEAL

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IN THE

Supreme Court of The United States

October Term, 1950

8 NO. 4

GEORGIA RAILROAD & BANKING CO.,
Appellant,

VS.

CHARLES D. REDWINE, State Revenue Commissioner,
Appellee

MOTION TO TERMINATE THE CONTINUANCE AND DECIDE THE APPEAR

Appellant, Georgia Railroad & Banking Company, moves the Court to terminate the continuance of the cause under the order entered February 20, 1950, to-wit:

"Per Curiam. Inasmuch as the Attorney General of Georgia stated at the bar of this Court that plain, speedy and efficient state remedies were available to appellant, the cause is ordered continued for such period as will enable appellant with all convenient speed to assert such remedies"

and to hear and decide the case.

SUMMARY GROUNDS OF MOTION

1. Appellee has filed plea of res judicata in State Court based on judgment of District Court on which this Court is withholding decision on appeal.

In obedience to the above order, appellant filed appeal to the

State Court, although believing that such appeal will be dismissed by the State Court on its own motion for want of jurisdiction. Appellee has now filed in the State Court a plea, setting out the judgment of the District Court below, and alleging that it decides a controlling issue against appellant. There is substantial authority in support of the contention of appellee that the judgment of the District Court is res judicate although on appeal to this Court. Refior v. Lansing Rock Forge Co., 134 F. (2d) 894; Cohen v. Superior Oil Corporation, 90 F. (2d) 810; Straus v. American Publishers Assn., 201 F. 306; see also Deposit Bank v. Frankfort, 191 U. S. 499; U. S. v. Munsingwear, Inc., No. 23, October Term, 1950, decided by this Court November 13, 1950.

The order of this Court therefore puts appellee in position to contend that the judgment of the District Court requires the State Court to decide the controlling issue against appellant, although this Court is withholding decision on appeal in order that the State Court may decide that very issue. The disastrous result that may result to appellant is illustrated by U. S. v. Munsingwear, Inc., No. 23, this term, decided by this Court November 13, 1950.

The usual remedy of appeliant to prevent such result is to move to continue the action in the State Court until this Court decides the appeal from the judgment of the District Court. Willard v. Ostrander, 51 Kan. 481, 32 P. 1092; Cohen v. Superior Oil Corp., 90 F. (2d) 810; Robinson v. El Centro Grain Co., 133 Cal. App. 561, 24 P. (2d) 554; 50 C. J. S. 623.

The application of such remedy, however, while the above order of February 20, 1950, remains in force, would lead to the stalemate of the State Court continuing the case until the appeal is determined in this Court, and this Court continuing appeal until the case is decided in the State Court.

2. Federal Court should decide validity and effect of judgment of Federal Court, affirmed by this Court, and enforce such judgment, and not remit appellant to State Court for that purpose.

The decision of the District Court, on which this Court is withholding decision on appeal, and which appellee is now pleading as res judicata in the State Court, was that the prior final judgment of the District Court, affirmed by this Court, permanently enjoining the collection of the taxes in question, is not binding on appellee. This presents a question of federal law which must ultimately be decided by this Court. Deposit Bank v. Frankfort, 191 U. S. 499. It should be decided in advance of consideration of the case as an original proposition, and if decided in favor of appellant, will finally conclude the entire case and render unnecessary consideration of any other issue. Gunter v. Atlantic Coast Line Railroad, 200 U. S. 273; Deposit Bank v. Frankfort, 191 U. S. 499.

This Court should not remit appellant to the State Court to decide the validity and effect of a judgment of the Federal Court affirmed by this Court. Most particularly this should not be done where such course permits the appellee to plead in the State Court that the judgment of the District Court, on which this Court is withholding decision on appeal, is conclusive on this issue and requires the State Court to decide this controlling issue adversely to appellant.

The Federal Court shows decide the validity and effect of and enforce its own judgment. Gunter v. Atlantic Coast Line Railroad, 200 U. S. 273. Indeed, it has been said that the Court which rendered judgment is the only Court that can enforce it. Railroad Co. v. Chamberlain, 6 Wall. 748.

It is the declared policy of Congress that the Federal Court enforce its own judgment, and not remit the parties to the State Court, even to the extent of enjoining any action in the State Court. Title 28, U. S. Code., Sec. 2283, and the statement of the revisers thereunder.

3. There are no unsettled questions of State law necessary to, or which might avoid the decision of the Federal issues.

Even hough the prior judgment be decided not to be controlling on appellee, there is no unsettled question of state law, the decision of which is necessary to, or which might avoid the decision on the federal constitutional issues. The validity and construction of the contract of exemption has already been determined by the Supreme Court of Georgia in State of Georgia v. Georgia Railroad & Banking Co., 54 Ga. 423, and by this Court in Wright v. Georgia Railroad & Banking Co., 216 U. S. 420, and Wright v. Louisville & Nashville Railroad Co., 236 U. S. 687. In such case this Court has held that the litigant will not be remitted to the State Court. Public Utilities Commission v. Gas Co., 317 U. S. 456, 463.

4. Appellant should not be remitted to the State Courts where, as here, there is no plain remedy in the State Court.

Even where there are unsettled questions of state law which might control the case and render unnecessary decision of the federal constitutional questions, this Court has held that the plaintiff should not be remitted to the State Court where "it is not clear that today [appellant] has open any adequate remedy in the [State] Courts." Hillsborough v. Cromwell, 326 U. S. 620, 628.

This is in accord with the settled policy of Congress, as declared in the Johnson Act, that a suitor not be denied relief in the Federal Court unless the remedy in the State Court is "plata". Title 28 U. S. Code, Sec. 1341; Hillsborough v. Cromwell, 326 U. S. 620; Atlantic Coast Line Railroad v. Daughton, 262 U. S. 413.

In this case appellant does not in fact have any remedy whatever in the State Court, and the appeal to the State Court will in all probability be dismissed by the State Court on its own motion for want of jurisdiction. The state statute expressly states in the plainest language that the remedy by appeal is not available to a railroad company required to make returns for ad valorem tax to the State Revenue Commissioner (Appellant's Brief p. 37, App. XXXII-XXXIII; Reply Brief p. 6). And, in view of the plea of res judicata filed by appellee, it now appears that the State Court may not be able to consider or decide a controlling issue in the case.

Certainly the remedy cannot be said to be "plain" under such

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circumstance. Hillsborough v. Cromwell, 326 U. S. 620; Atlantic Coast Line v. Daughton, 262 U. S. 413.

This Court has never before, as far as appellant can discover, denied a suitor relief in the Federal Court on the mere assertion of the opposite party that there was a plain remedy in the State Court without even considering whether there was in fact any such remedy. In every previous case before this Court, this Court has carefully considered and determined that there was a plain and adequate remedy in the State, before denying relief in the Federal Court. Railroad Comm'n. v. Pullman Co., 312 U. S. 496, 501, Chicago v. Fieldcrest Dairies, 316 U. S. 168, 173; Great Lakes Co. v. Huffman, 319 U. S. 293, 296; A. F. of L. v. Watson, 327 U. S. 582, 599. And where it was not "plain" beyond question that plaintiff had an adequate remedy in the State Court, this Court has decided the case. Hallsborough v. Cromwell, 326 U. S. 620; Corporation Comm'n v. Cary, 296 U. S. 452; Fox v. Standard Oll Co., 294 U. C. 87, 94; Atlantic Coast Line v. Daughton, 262 U. S. 413; Wallace v. Hines, 253 U. S. 66; Union Pac. Railroad Co. v. Weld County, 247 U. S. 282; Driscoll v. Edison Co., 307 U. S. 104; Mountain States Co. v. Comm., 299 U. S. 167; Graves v. Texas Co., 298 U. S. 393: Hopkins v. Southern Cal. Tel. Co., 275 U. S. 393.

The fact that the Attorney General stated that there was a remedy does not establish that fact. As Mr. Justice Frankfurter has observed, "After all, advocates, including advocates for States, are like managers of pugilistic and election contestants in that they have a propensity for claiming everything." Dissenting Opinion, First Iowa Coop. v. Power Commission, 328 U.S. 152, 187.

5. Appellant in fact first sought unsuccessfully to obtain a remedy in the State Court.

Appellant in fact attempted to secure relief in the State Court before filing suit in the Federal Court. The Supreme Court of Georgia held that the remedy was not available to appellant and expressly declined to intimate an opinion on what remedy, if any, was available to appellant. Musgrove v. Georgia Railroad & Banking Co., 204 Ga. 139, 159.

6. The long delay in obtaining an adjudication is causing irreparable injury to appellant.

Appellant has vigorously, but so far unsuccessfully, sought since October 15, 1945, to obtain an adjudication of the issues either in the State or in the Federal Court. It is no closer to adjudication now than it was then. Meanwhile, if appellant ultimately loses, taxes at the rate of over a hundred thousand dollars per year are accruing, and interest at the rate of over \$93,000 per year is accruing. Already, through 1949, over \$1,600,000 has accrued if appellant is liable. Since the liability is in litigation, no income tax deduction is being allowed.

Justice so long delayed is justice denied.

STATEMENT OF FACTS.

The charter of appellant, granted by the legislature of Georgia, provides that the capital of appellant shall be subject to tax only at the rate of one-half of 1 percent of the net return thereon (Ga. Laws; 1833, p. 256; Appellant's Brief, App. p. 1). Both the Supreme Court of Georgia and this Court have held that that provision is an irrevocable contract which the State of Georgia may not impair under the Constitution of the United States. Wright v. Georgia Railroad & Banking Co., 216 U. S. 420; Wright v. Louisville & Nashville R. R. Co., 236 U. S. 687; State of Georgia v. Georgia Railroad & Banking Co., 54 Ga. 423.

Nevertheless, in 1945, the State of Georgia adopted an amendment to its Constitution attempting to revoke and nullify that provision (Appellant's Brief, App. p. XXIV).

On October 15, 1945, appellant brought an action in the Courts of Georgia for declaratory judgment and to enjoin the taxing authorities from imposing taxes contrary to that provision in the charter. The Supreme Court of Georgia held that the remedy attempted was not available to appellant and expressly declined to intimate an opinion on what remedy, if any, was available to appellant in the Courts of Georgia. Musgrove v. Georgia Railroad & Banking Co., 204 Ga. 139.

Appellant then brought this action in the Federal Court to enforce the existing permanent injunction affirmed by this Court; or, in the alternative, as an independent action, to enjoin the State taxing authorities from attempting to assess and collect the taxes from appellant (R. 1-9).

The District Court held, on motion to dismiss, that the prior permanent injunction affirmed by this Court could not be enforced against the present State officials, and that the action could not proceed as an independent action to enjoin the State officials from collecting the tax because such suit was a suit against the State within the prohibition of the 11th Amendment, and dismissed the action (R. 170-181). One Judge dissented, saying that the prior judgment, affirmed by this Court, was conclusive and should be enforced by the Court that entered it (R. 180).

Appellant appealed directly to this Court. In argument here appellee contended, among other things, that the judgment of dismissal should be affirmed because appellant had a "plain, speedy and efficient" remedy in the Courts of Georgia within the meaning of the Johnson Act. The appellant contended, on the other hand, that it had no remedy whatever in the Courts of Georgia, or, if there was any remedy, it certainly was not "plain" within the meaning of the Johnson Act (Appellant's Brief, p. 31-38, Reply Brief, p. 5).

This Court, without considering or deciding whether there was any remedy in the Courts of Georgia, and if there was one, whether it was "plain", entered, on February 20, 1950, the following order:

"Per Curiam: Inasmuch as the Attorney General of Georgia stated at the bar of this Court that plain, speedy and efficient state remedies were available to appellant, the cause is ordered continued for such period as will enable appellant with all convenient speed to assert such remedies."

The remedy stated by the Attorney General in oral argument to be available to appellant was by appeal to the Superior Court from the assessment of the State Revenue Commissioner under the Act approved February 17, 1943 (Georgia Laws 1943, page 204; Appellant's Brief, App. p. XXXI). Appellant contended that the Georgia statute in the plainest possible language provides that such remedy is not available to appellant under the circumstances of this case, and that certainly such remedy is not "plain" within the meaning of the Johnson Act (Appellant's Brief, p. 37, Reply Brief p. 6).

Nevertheless, in obedience to the order of this Court, appellant promptly moved to have the injunction pending appeal modified so as to permit the assessment to be made. On May 26, 1950, appellee notified appellant of the proposed assessment. Within 30 days appellant filed protest as provided by Georgia law. Appellee set a hearing thereon July 12, 1950. Thereafter on September 21, 1950, appellee overruled the protest and made the assessment. Appellant promptly appealed to the Superior Court of Richmond County, Gorgia. In said proceeding appellee has now filed a plea alleging that the judgment of the District Court, on which this Court is withholding judgment on appeal at the request of appellee in order that the issues may be decided in the State Court, is res judicata in the State Court and concludes the issue: Said plea alleges:

"Appellee denies paragraph 5 of the protest, as pleaded, and says that the judgment in the case of Wright v. Georgia Railroad and Banking Company, 216 U. S. 420, has since its rendition been held by the Supreme Court of Georgia as not res judicata against the State Revenue Commissioner of Georgia in the case of Musgrove v. Georgia Railroad and Banking Company, 204 Ga. 39 [sic], and has likewise been held not res judicata and not binding on this appellee by the District Court for the Northern District of Georgia in the case of Georgia Railroad and Banking Company v. Redwine, adjudicated July 9, 1949, a copy of which judgment by a majority of the Court is included in the transcript of record of the case of Georgia Railroad and Banking Company v. Redwine, pages 170 to

the end of said opinion on page 180, which by reference appellee attaches as his Exhibit "A"."

Paragraph 5 of appellant's protest, referred to in the above plea, alleges that the prior final judgment of the District Court, affirmed by this Court in Wright v. Georgia Railroad & Banking Co., 216 U. S. 420, is res judicata and adjudicates that the taxes in question may not be collected. Pages 170-180 of appellee's Exhibit A referred to above is the opinion and judgment of the District Court now on appeal to this Court.

CONCLUSION

Wherefore, appellant moves the Court to terminate the continuance and decide the appeal.

ROBERT B. TROSTMAN FURMAN SMITH Counsel for Appellant

Spalding, Sibley, Troutman & Keliey 434 Trust Company of Georgia Bldg. Atlanta, Georgia

Of Counsel for Appellant

Before the undersigned, an officer authorized to administer eaths, personally appeared FURMAN SMITH, who, being sworn, says on oath that he is counsel for appellant in the above stated case and has personal knowledge of the facts stated in the foregoing motion to terminate the continuance and decide the appeal and that the facts stated in such motion are true.

FURMAN SMITH

Sworn to and subscribed before me this 20th day of November, 1950.

EUGENIA H. BROOK Notary Public

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· IN THE

CHARLES ELMORE COSCLEY

Supreme Court of The United States

OCTOBER TERM 1950 1951

NO. 4.

GEORGIA RAILROAD & BANKING Co., Appellant,

VS.

CHARLES D. REDWINE, State Revenue Commissioner,

Appellee

REPLY OF APPELLANT TO RESPONSE OF APPELLEE
TO MOTION TO TERMINATE CONTINUANCE AND
DECIDE APPEAL

ROBERT B. TROUTMAN, FURMAN SMITH, Counsel for Appellant

Spalding, Sibley, Troutman' & Kelley 434 Trust Company of Georgia Bldg. Atlanta, Georgia Of Counsel for Appellant

IN THE

Supreme Court of The United States

OCTOBER TERM 1950

NO. 4

GEORGIA RAILROAD & BANKING Co.,
Appellant,

VS.

CHARLES D. REDWINE, State Revenue Commissioner,

Appellee

REPLY OF APPELLANT TO RESPONSE OF APPELLEE TO MOTION TO TERMINATE CONTINUANCE AND DECIDE APPEAL

In his response to appellant's motion to terminate the continuance and decide the appeal, appellee asserts (page 2) that the deliberate purpose and effect of the order of this Court of February 20, 1950, was to remit appellant to the State Court under such circumstances that the State Court would be precluded from deciding a controlling issue in favor of appellant, because the judgment of the District Court, on which this Court is withholding decision on appeal, is res judicata on the issue. He says (page 2):

"The order of continuance should, therefore, be construed as necessarily and intentionally giving to the judgment of the District Count just exactly the scope and meaning which appellant now attributes to it (Appellant's Motion, pages 1 and 2)." Certainly a state remedy in which the State Court is precluded from considering or deciding the controlling issue is neither "plain" nor "efficient".

It is difficult for us to believe, however, as asserted by appelled that this Court "intentionally" participated in a maneuver designed to deny appellant the hearing provided by law in this Court in such way assalso to deny a hearing in the State Court, without either court assuming responsibility for the result.

Respectfully submitted,

ROBERT B. TROUTMAN, FURMAN SMITH, Counsel for Appellant

Spalding Sibley, Troutman & Kelley 434 Trust Company of Georgia Bldg.

Of Counsel for Appellant

FILE COPY

Office Supreme Court, U. S. F'ILEID

AUG. 25 1951

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IN THE

Supreme Court of The United States OCTOBER TERM, 1951

NO. 1

GEORGIA RAILROAD & BANKING COMPANY,

Appellant,

VS.

CHARLES D. REDWINE, STATE REVENUE COMMISSIONER,

Appellee.

MOTION OF APPELLANT TO TERMINATE CONTINUANCE AND DECIDE APPEAL

ROBERT B. TROUTMAN FURMAN SMITH Counsel for Appellant

Spalding, Sibley, Troutman & Kelley 484 Trust Company of Georgia Bldg. Atlanta, Georgia Of Counsel for Appellant

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IN THE

Supreme Court of The United States

October Term, 1951

NO. 1

GEORGIA RAILROAD & BANKING COMPANY, Appellant,

VS.

CHARLES D. REDWINE, State Revenue Commissioner, Appellee

MOTION OF APPELLANT TO TERMINATE CONTINUANCE AND DECIDE APPEAL

Appellant, Georgia Railroad & Banking Company, moves the Court to terminate the continuance of the cause under the order entered February 20, 1950, to-wit:

"Per Curiam: Inasmuch as the Attorney General of Georgia stated at the bar of this Court that plain, speedy and efficient state remedies were available to appellant, the cause is ordered continued for such period as will enable appellant with all convenient speed to assert such remedies."

and to assign the case for reargument and to hear and decide the case

GROUNDS OF MOTION

In the oral argument before this Court on February 13, 1950, the Attorney General of Georgia, counsel for the appellee,

stated to the Court that appellant had a plain, speedy and efficient remedy in the courts of Georgia. This Court asked the Attorney General what such remedy was. The Attorney General repfied that such remedy was by appeal from the assessment of the State Revenue Commissioner to the Superior Court of Georgia.

The proceedings on oral argument before this Court were not reported, but the above facts were confirmed in writing and were not denied by the appellee (App. p. 6).

Appellant, on the other hand, both in its brief and in oral argument, insisted that it had no remedy in the courts of Georgia, or if that if such remedy existed it certainly was not "plain".

Based on the assertion of the Attorney General in oral argument, however, this Court entered the order quoted above.

In compliance with said mandate of this Court, appellant took an appeal with all convenient speed from the assessment of the State Revenue Commissioner to the Superior Court of Richmond County, Georgia, and from the judgment of that Court appealed to the Supreme Court of Georgia.

The Supreme Court of Georgia has now held that the asserted remedy by appeal from the assessment of the Commissioner to the State Court is not available to appellant and has directed that the proceeding be dismissed for lack of jurisdiction in the Superior Court. A motion for rehearing was filed and has been denied. The opinion of the Supreme Court appears in the Appendix at page 7-21.

There is no other remedy available to appellant in the courts of Georgia.

The Supreme Court of Georgia has expressly declined to indicate what remedy, if any, is available to appellant, although requested to do so. Musgrove v. Georgia Railroad & Banking Co., 204 Ga, 139, 159.

Three Justices of the Supreme Court have stated:

- "... Any other construction [than that the remedy by appeal exists] leaves uncertain and indefinite how a railroad company, or similar body, can have its tax liability adjudicated in the courts.
- Code, we are constrained to the view that there is no part of our law more perplexing and confusing than the Code provisions relating to procedures involved in the administration of those laws. There exists much confusion as to the matter affidavit of illegality, and other procedure for a taxpayer of the kind here involved to raise the issue of taxability. The history of this litigation demonstrates that confusion." Georgia Railroad & Banking Co. v. Redwine, App. p. 19-20.

Nothing has been said to the contrary by any of the other Justices.

Appellee has admitted that since it has been determined that appellant does not have the right of appeal, there is no other remedy available to appellant in the courts of Georgia. In his motion for rehearing to the Supreme Court of Georgia (par. 7, p. 3) he said:

"In deciding sua sponte that the Act of 1948, supra, took away the only available method open to the Railroad to review judicially the question of its taxability ad valorem, the court overlooked and failed to decide, as movant insists it should have done, whether the Act of 1943 was in this respect unconstitutional as denying to the Railroad

due process of law in violation of the Fourteenth Amendment to the Federal Constitution and that of the State Constitution, Art. I, Sec. I, Par. III (Code Sec. 2-103)."

And in his brief in support of his motion for rehearing (p. 14) he said:

"The construction placed upon the Act of 1943 takes away from the Railroad the only remaining method for judicial determination of questions of taxability. Therefore, if the meaning of the Act of 1943 is correctly construed it is to that extent unconstitutional as violating the due process clause of the Fourteenth Amendment to the Federal Constitution and of Article I, Sec. I, Paragraph III of the Constitution of Georgia."

Appellant has now tried and been denied three remedies in the courts of Georgia:

- (1) By action for declaratory judgment, Musgrove v. Georgia Railroad & Banking Co., 204 Ga. 139, appeal dismissed 335 U. S. 900;
- (2) By suit to enjoin the State Revenue Commissioner in the State Court, Musgrove v. Georgia Railroad & Banking Co., supra;
- (3) By appeal from the assessment of the State Reverbue Commissioner to the Superior Court, Georgia Railroad & Banking Co. v. Redwine, App. p. 7.

Appellant has been attempting with titinost diligence to obtain an adjudication of the marits of this case since October 15, 1945. While the assertion has repeatedly been made that there were ample and "plain" remedies available to appellant, each such remedy attempted by appellant has been denied without consideration of the merits of the case. Meanwhile, if appellant is ultimately held liable, taxes at the rate of over \$100,000 a

year is accraing. Already nearly \$2,000,000 have accrued. Since this liability is being denied no income tax deduction is being allowed.

Appellant therefore respectfully requests the Court to terminate the continuance and decide the appeal.

Respectfully submitted;
ROBERT B. TROUTMAN
FURMAN SMITH
Counsel for Appellant

Before the undersigned, an officer authorized to administer oaths, personally appeared FURMAN SMITH, who, being sworn, says on oath that he is counsel for appellant in the above case and that the facts stated in the foregoing motion are true.

FURMAN SMITH ...

Sworn to and subscribed before me this the 15th day of August, 1951.

EUGENIA H. BROOK Notary Public

APPENDIX

1. Letter confirming statement made in oral argument.

March 30, 1950

Hon. M. H. Blackshear Deputy Assistant Attorney General State Capitol Atlanta, Georgia

Dear Hardeman:

Re: Georgia Railroad & Banking Company y. Redwine, Revenue Commissioner

Inasmuch as the Supreme Court based its order of February 20 on what was said orally, dehors the record, and in order that there may be no misunderstanding between us in the future, we feel it desirable to conform in writing what has been said, as follows:

- 1. You stated in oral argument at the bar of the Supreme Court that Georgia Railroad & Banking Company had a plain remedy in the courts of Georgia to contest the tax proposed to be assessed against it. The Court then inquired of you what such remedy was. You then stated that the remedy was by appeal from the assessment of the Revenue Commissioner as provided in Sec. 1 of the Act approved January 3, 1938, as amended by the Act approved February 17, 1943.
- 2. You further stated in oral argument in the Supreme Court that Georgia Railroad & Banking Company had the right to file with the Revenue Commissioner a protest against the proposed assessment and that, on such protest, it could raise all of its constitutional objections to the tax and that it was the duty of the Revenue Commissioner to consider and decide such questions and that, if he were convinced that the proposed tax was contrary to the Constitution, to sustain the protest and quash the proposed assessment

3. We have stated to you, Mr. Cook and Mr. Davidson that in our opinion Georgia Railroad & Banking Company does not have any remedy by appeal and that the State Court may well dismiss such remedy on its own motion. We therefore suggested to you that you bring suit against the railroad in the Superior Court to collect such tax. We stated that in our opinion the Revenue Commissioner and the Attorney General had a plain right to bging suit in the courts of Georgia to collect the tax and that, in such case, the Georgia Railroad & Banking Company would undoubtedly have the right to file answer raising all of its defenses to such tax and that, in such case, the courts of Georgia would have unquestion le jurisdiction to determine the issues involved. You have stated to us that the Revenue Commissioner and the Attorney General will not bring such suit in the courts of Georgia but intend to proceed by assessment and the issue of execution against the Georgia Railroad & Banking Company.

> Yours very truly, Furman Smith

FS:eb

CC: Hon. Fagene Cook Attorney General State Capitol Atlanta, Georgia

> Mr. Victor Davidson Irwinton, Georgia

2. Opinion of Supreme Court of Georgia holding remedy of appeal does not exist.

Supreme Court of Georgia.

No. 17467. Georgia Railroad & Banking Company v. Redwine, Commissioner.

Decided June 13, 1951.

By the Court:

1. When a trial court, in a case over which it has, as to

subject-matter, no jurisdiction, renders therein any judgment except one of dismissal, this court will of its own motion reverse the same whether exception to it for want of jurisdiction in the court below be taken in the bill of exceptions or not.

2. There is no law of force in this State authorizing an appeal to the superior court by a railroad company whose property has been assessed by the State Revenue Commissioner for ad valorem taxation; and the appellate jurisdiction of the superior court must be exercised, and can only be exercised in those cases where the right of appeal thereto is provided by law.

Candler, Justice. On May 26, 1950, Charles D. Redwine, as State Revenue Commissioner for Georgia, assessed for ad valorem taxation certain real and personal property in this State belonging to the Georgia Railroad and Banking Company and notified the Company that the assessment as made by him would become final after the expiration of thirty days therefrom unless a written protest was filed thereto. The assessment so made was for the years 1939 to 1950, inclusive, and was for State, county, municipal and school district taxes at the rate fixed for all other like property in this State for each of the years mentioned. The Company was also notified that appropriate adjustments would be made for the taxes which it had previously paid during the years involved at the rate of one-half of one per cent. of its net earnings. On June 22, 1950, the Company filed a written protest, alleging that the assessment was illegal because its property was, for reasons therein stated, exempt from all ad valorem taxes. After a hearing, the Commissioner sustained the validity of his assessment and the Company took an appeal to the Superior Court of Richmond County. By final decree that court likewise sustained the assessment as made and the exception here is to that judgment.

1. It is argued by counsel for plaintiff in error that the trial court had no jurisdiction to entertain an appeal in this case from the State Revenue Commissioner's final decision. If that be true, the judgment complained of is a nullity and must be reversed. Code, § 110-709; Head v. Bridges, 67 Ga. 227;

Fussell v. Dennard, 118 Ga. 270 (45 S. E. 247); Jones v. Smith, 120 Ga. 642 (48 S. E. 134); Franklin County v. Crow, 128 Ga. 458 (57 S. E. 784). The parties to litigation cannot give to a court jurisdiction of the subject-matter of a suit when it has none by law; and when a trial-court, in a case over which it has, as to subject-matter; no jurisdiction, renders therein any judgment except one of dismissal, and the case is brought here for review upon a writ of error, this court will of its own motion reverse the judgment whether exception to it for want of jurisdiction in the court below be taken in the bill of exceptions or not. Smith v. Ferrario, 105 Ga. 51 (31 S. E. 38); O'Brien v. Harris, 105 Ga. 732 (31 S. E. 745); Cutts v. Scandrett, 108 Ga. 620 (34 S. E. 186); Kirkman v. Gillespie, 112 Ga. 507 (37 S. E. 714); Dix v. Dix, 132 Ga. 630, 633 (64 S. E. 790). And in the circumstanges of this case it cannot be said that the plaintiff in error is by conduct estopped to assert the trial court's lack of jurisdiction to entertain and render final judgment on its appeal thereto. "Jurisdiction of the subjectmatter of a suit cannot be conferred by agreement or consent, or be waived or 'based on an estoppel of a party to deny that ait exists." Langston v. Nash, 192 Ga. 427, 429 (15 S. E. 2d, 481), and the cases there cited.

2. The right of appeal from one court to another is not a common law right, but depends on statute; and the same authority which bestows it may likewise withhold or withdraw it. Griffin v. Sisson, 146 Ga. 661 (92 S. E. 278). Our Constitution of 1945 provides that the superior court shall have appellate jurisdiction "in all such cases as may be provided by law," and in DeLamar v. Donnar, 128 Ga. 57, 66 (57 S. E. 85), it was said: "The appellate jurisdiction of the superior court must be exercised, and can only be exercised, in such cases as are provided by law." Therefore, we must look to and find authority in our statutes for the right of appeal to the superior court in this case if it exists as counsel for the defendants in error insist. By Chapter 92-59 of the Code of 1933 all persons or companies owning or operating railroads, street railroads, suburban railroads or sleeping cars; and all persons or companies, including railroads, doing an express, telephone, or telegraph business in this Sta'e are among those who were re-

quired to make annual tax returns of all property owned by them, and located in this State, to the Comptroller Ceneral. Code, § 92-5902. The Comptroller General was required to carefully scrutinize the returns so made to him, and if in his judgment the property embraced therein was returned below its value, or the return was false in any particular, or in any wise contrary to law, he was required within 60 days thereafter to correct it and assess the value, from any information he could obtain. Code § 92-6001, Also, if the Comptroller General found that any owner of such property had refused or failed to make a return of it for taxation, he was authorized by section 92-6103 of the Code, after giving the owner thereof 20 days notice in writing, to assess it for State, county, municipal and school district axes, from the best information obtainable as to its value. However, no provision for an appeal from the assessment of the Comptroller General was provided for in either event; but if the owner of such property disputed his assessment as to taxability, by section 92-6104 of the Code he was permitted to raise that question by petition in equity in, the Superior Court of Fulton County; and if dissatisfied with the assessment as to value, his remedy was by arbitration under section 92-6001 of the Code. And later, by section 80 of the reorganization act of 1931 (Ga. L. 1931, p. 33), the owner of such property was permitted to contest the question of its taxability by an affidavit of illegality. Code § 92.7301. See also, in this connection, Hicks v. Stewart Oil Company, 182 Ga. 654 (4) (186 S. E. 802); and Carreker v. Green & Milam, Inc., 183 Ga. 864 (189 S. E. 836). The legislature by an act approved January 3, 1938 (Ga. L. Ex. Sess. 1937-38, p. 77). created the State Department of Revenue and vested in a State Revenue Commissioner all of the powers and duties respecting taxation previously performed by the Comptroller General. A State Board of Tax Appeals, consisting of the comptroller general, the auditor, and the treasurer, ex officio, was created by the act and section 19 thereof declares, in part, that "The function of the Board of Tax Appeals shall be to review the assessments made by the State Revenue Commissioner when by such assessments, after hearing by the Commissioner or his regularly authorized employee or agent, any taxpayer may be

aggrieved and petition for said review." Section 45 of the act also provides that "The findings by the Board of Tax Appeals shall not be final; but either party may appeal from any order, ruling, or finding of the said Board to the Superior Court of the county of the residence of the taxpayer unless the taxpayer be a range road or other public service corporation or non-resident, in which event the appeal of either party shall be to the superior court of the county in which is located its principal place of odoing business, or in which the chief or highest corporate officer, resident in this State, maintains his office." Accordingly, by the act of 1938 provision was made by the legislature for a review of the decision of the board of tax appeals (created by the act for the purpose of settling disputes as to valuation and taxability) by the superior court in a de novo investigation when a dissatisfied taxpayer entered an appeal thereto from the board's decision. See Columbus Mutual Life Insurance Co. v. Gullatt, 189 Ga. 747 (8 S. E. 2d, 38). But, except as shown above, the taxing act of 1938 made no provision for an appeal to the superior court for the review of any question. The legis-lature, however, in 1943 passed an act (Ga. L. 1943, p, 204), which, in several respects, materially changed the act of 1938. By section 2 of it, all of the sections in Chapter III of the act of 1938, which created the board of tax appeals and defined its jurisdiction, were expressly repealed and new sections were enacted in lieu thereof. Concerning the right of appeal, section 18 of the amending act of 1943 reads as follows: "Except as otherwise provided by this act, all matters, cases, claims, and controversies, of whatseever nature arising in the administration of the revenue laws, or in the exercise of the jurisdiction of the State Revenue Commissioner or the Department of Revenue, as conferred by this act, shall be for determination by the State Revenue Commissioner, subject to review by the courts as provided for by section 45 of Chapter IV of this act. The effect of this section shall be that, except as hereinafter provided, all final rulings, orders and judgments of the State Revenue Commissioner shall be subject to appeal and review under section 45 of this act in the same manner, under the same procedure, and as fully, as if the same had been considered and passed upon by the State Board of Tax Appeals." But section 19 of

the amending act of 1943 expressly declares that, "The provisions of the foregoing section with reference to reviewing assessments of the State Revenue Commissioner shall not apply to assessments for ad valorem taxation against any person, corporation, or company which was required by Chapter 92.59 of the Code of 1933 to return his or its property for ad valorem tatxation to the Comptroller General and is now required by such Chapter and this act of January 3, 1938, to make such returns to the State Revenue Commissioner." We can not agree with counsel for the defendants in error that the exception referred to in section 18 and expressly stated in section 19 of the amending act of 1943 has reference to an assessment of value only. An examination of the taxing act of 1938 discloses that the State Revenue Commissioner has power to determine the taxability of property as well as authority to fix its value. for taxing purposes and the act of assessing such property for taxation includes a determination of the former as well as an ascertainment of the latter. Forrester v. Pullman Company, 192 Ga. 221, 222 (15 S. E. 2d, 185). According to Black's Law Dictionary (3d ed.), the word "assessment" when used in connection with the subject of taxation, includes all of the steps necessary to be taken in the legitimate exercise of the power to tax. Therefore, it seems very clear to us, from the plain language employed, that the legislature by sections 18 and 19 of the amending act of 1943 provided for an appeal to the superior court, under the procedure described by section 45 of the act of 1938, from any final ruling, order, or judgment of the State Revenue Commissioner, except any final ruling, order or judgment of the Commissioner respecting assessments for ad valorem taxation against any person, corporation, or company which was required by Chapter 92-59 of the Code of 1933 to return his or its property to the Comptroller General for tatxation and who now by the act of 1938 is required to make such returns to the State Revenue Commissioner, among which are railroad companies. Consequently, we must and do hold that our statutes make no provision for an appeal to the superior court from the decision of the State Revenue Commissioner by a railroad company whose property has been assessed by the commissioner for ad valorem taxation. That

being true, the Superior Court of Richmond County had no jurisdiction to entertain the appeal in this case; and the judgment complained of is for that reason a nullity and must be reversed.

Judgment reversed. All the Justices concur, except Duckworth, C. J., and Atkinson, P. J., who dissent; Pharr, Judge, presiding for Head, J., who is disqualified, concurs specially.

Duckworth, Chief Justice and Atkinson, Presiding Justice, dissenting. For the reasons stated in division 1 of the special concurrence of Judge Pharr we dissent from the opinion of the majority and do not concur in the judgment of reversal upon the ground upon which the majority judgment is based. Since, under the ruling made by the majority the merits of the case are not passed upon, we, therefore, intimate no opinion with reference to the merits.

Pharr, Judge, concurring specially. 1. For the reasons here-inafter set forth, I am compelled to dissent from the foregoing opinion upon the question of jurisdiction.

Originally, all railroads were required to make their tax returns to the Comptroller General (Code, § 92-5902). There was some uncertainty under the Reorganization Act of 1931 (Ga. Laws 1931, p. 7) as to what duties were left with the Comptroller General, but by section 4 of the Act of 1938 (Ga. Laws 1937-38, pp. 77, 80) all duties relating to matters of taxation theretofore vested in the Comptroller General were vested in the State Revenue Commissioner. The 1938 act as changed by the amendment of 1943 (Ga. Laws 1943, p. 204) is now codified in the Pocket Parts Ga. Code Annotated and reference will be made to the sections as they appear there.

Without the excepting clause Section 92-8426.4 provides in part as follows: "... all matters, cases, claims and controversies, of whatsoever nature arising in the administration of the revenue laws, or in the exercise of the jurisdiction of the State Revenue Commissioner or the Department of Revenue, as conferred by this Chapter shall be for determination by the State Revenue Commissioner, subject to review by the courts as pro-

vided for by section 92-8446. The effect of this section shall be that, . . . all final rulings, orders and judgments of the State Revenue Commissioner shall be subject to appeal and review under section 92-8446."

Section 82-445 (which is the codification of Section 45 of the 1938 Act) provides in part as follows: "Either party may appeal from any order, ruling, or finding of the said Commissioner to the superior court of the county of the residence of the taxpayer, unless the taxpayer be a railroad or other public service corporation or non-resident, in which event the appeal of either party shall be to the superior court of the county in which is located its principal place of doing business, or in which the chief or highest corporate officer, resident in the State, maintains his office."

Under the language of these sections, without the excepting clauses, any final ruling, order, or judgment of the Revenue Commissioner may be appealed to the Superior Court, and it appears clear that this would, include any ruling, order, or judgment in which the taxpayer is a Railroad Company. Thus, unless the determination of liability for ad valorem tax of a Railroad is specifically excluded, or excepted then a Railroad may appeal such a ruling to the Superior Court.

Section 92-8426.1 contains at the beginning the words, "except as otherwise provided by this law (92-8426.4 to 92-8426.6)" and in the second sentence "except as hereinafter provided." From this language and from a careful scrutiny of all three sections it appears that the only exception is that set out in 92-8426.5. The pertinent parts of that section are as follows:

"The provisions of section 92-8426.4 with reference to reviewing assessments of the State Revenue Commission shall not apply to assessments for ad valorem taxation against any person, corporation or company which was required by Chapter 92-59 of the Code of 1933 to return his or its property for ad valorem taxation to the Comptroller General and is now required by such Chapter and this Chapter to make such returns to the State Revenue Commissioner. The State Revenue Com-

missioner shall carefully scrutinize such returns made to him, and if in his judgment the property embraced therein is returned below its value or the return is false in any particular, or in any wise contrary to law, he shall, within 60 days thereafter, correct the same and assess the value, from any information available. If any such person, corporation, or company shall be dissatisfied with the assessment or correction of such returns as made by the State Revenue Commissioner or the Department of Revenue, such taxpayer shall have the privilege, within 20 days after notice of such assessment and correction, to refer the question of true value or amount to arbitration as provided by Chapter 92-60 of the Code of Georgia of 1933. Such arbitrators shall consist of one chosen by the taxpayer and one chosen by the Governor. . . The decision and award of the arbitrators or of the arbitrators and the umpire shall be subject to appeal and review in the same manner as decisions and orders of the State Revenue Commissioner are subject to appeal and review under the terms of section 92-8446."

The words "with reference to reviewing assessments" are different from the language used in the preceding section. The preceding section gives the Revenue Commissioner the broad power to make a determination of all matters, cases, claims, and controversies of whatsoever nature arising in the administration of the Revenue laws, and gives the right of appeal from all final rulings, orders and judgments of the Commissioner. the word "assessments" is not used.

Thus, we must determine whether the words "assessments for ad valorem taxation" (against a railroad) as used in Section 92-8426.5 means the determination of the single issue of tax liability of a railroad where there is no question of valuation.

At first glance and because of the broad and varied meanings given to the word "assessment" in statutes, decisions and common usage the right of appeal by a Railroad may seem to be excluded. However, in order to determine the present issue it is necessary to give careful consideration to the meaning of the word "assessment" as used in this section and endeavor to ascertain what the Legislature intended in using it as it did.

While the language used says "the provisions of the preceding section with reference to reviewing assessments" nothing is said in the preceding section with reference to reviewing assessments. The preceding section deals only with the power of the Commissioner to determine all matters, cases, claims, and controversies of whatsoever nature and it further says that the effect of the section shall be that all final rulings, orders and . judgments of the Commissioner shall be subject to review. By referring to the preceding section, it is apparent that "assessment" is embraced in the larger power of determining all cases, claims, matters and controversies of whatsoever nature and is included somewhere in rulings, orders and judgments. Thus, the exception carves out of the orders, rulings and judgments only the assessment portion. To break it down a little further, we should look to the language of section 92-8426.5 in which the word "assessment" is used to see if there is any indication from other language exactly what is meant by the word "assessment." The whole purport of section 92-8426.5 is that on questions of valuation, an appeal may be had to arbitration and from there an appeal to the Superior Court. Thus, the whole of section 92-8426.5 seems intended to deal only with the matter of providing the opportunity for arbitration of valuation. Section 92-8426.5 says that the Commissioner shall scrutinize the returns and "assess the value." It says that if any such person be dissatisfied with the "assessment" he may refer the question of "true value or amount" to arbitrators. All through this section it is apparent that it is dealing with the question of fixing value and not with the question of taxable liability. Thus, if any light is thrown on the use of the word "assessments" in the first sentence by the other provisions of Section 92-8426.5, it is that "assessment" means the determination of true value or amount. No mention is made of determining tax liability. The word "assessments" is used in the third sentence, wherein it is provided that if the taxpayer "be dissatisfied with the assessment" he may "refer the question of true value or amount to arbitrators." It seems to us inescapable that the word "assessment" used in the third sentence, just referred to, is so tied in with the rest of the sentence as to mean only the question of true value or amount. Now, if it means valuation in the third

sentence, does it not mean valuation in the first sentence? There is no indication of any intention to attach a different meaning to the same word used twice in the same section. If it means value, or valuation, or fixing value in the third sentence, then is it not logical to say that it means the same thing in the first sentence? If assessment means the fixing of value in the first sentence, then it would read to the effect that the provisions of the preceding section with reference to the reviewing of valuations fixed by the State Revenue Commission shall not apply to determinations of value for ad valorem taxes against a railroad. To construe it that way makes sense. To construe it that way does not take away the right of appeal from a determination of tax liability.

Let us analyze it another way. What does the word "assessiment" mean? Its origin is from the Latin word "assessare," which means to value for taxation. In Webster's New International Dictionary, 2nd edition, 1947, one of the definitions of "assess" is "to value", and one of the meanings of "assessment" is "valuation of property for the purpose of taxation." It is true that other definitions are given. In Dunn'v. Harris, 144 Ga. 157, on page 163 the Court said: "Assessment is quasi judicial, and consists in making out a list of the taxpayer's taxable property and fixing its valuation or appraisement."

In the case of Columbus Mutual Life Ins. Co. v. Gullatt, 189 Ga. 747, the Court discusses "assessment" at some length and shows a distinction between "assessment" and "taxability." On page 752, it is said: "The arbitrators are to 'fix the assessments.' This can only mean that they are to determine valuation." And on page 753, the Court says: "In most of the acts relating to tax assessments passed since 1910 provision is made for contesting the taxable value of property by arbitration. ..." And further the Court says: "It will thus be seen that while there have been exceptions in one or two instances from the general rule of determining valuation by arbitration, in no instance has the legislature departed from the policy of permitting contests of taxability to be determined by the Superior Courts."

Thus the Court not only shows the distinction between taxability and "assessment" as valuation, but also indicates the general policy of the legislature in providing arbitration for valuation and contests of taxability by the Superior Courts. That general scheme and plan is carried out in the present act under consideration if the word "assessment" is not given a broader definition than it justly deserves.

Of course, a great deal of the confusion is brought about by the loose use of the word "assessment." Common usage has brought it to mean anything relating to the imposition of taxes and it is not uncommon to use the expression as synonymous with levying a tax, imposing a tax, fixing tax liability, or determining value. But in the ad valorem taxing process, the present case is a good illustration of what occurs. First, of courses, there must be a law imposing the tax. Second, there must be a determination of tax liability against the person or corporation. Third, there must be a determination of the value of the property taxed ad valorem, and fourth, the necessary proceeding to enforce the tax. Upon analysis, it will appear clear that only the third step is the assessment step, that is, where the value of the property is determined, the act of assessment is performed. No assessment can be made until the second step is complied with, and that is the determination of waability. So, in the present case the Commissioner made a determination of tax liability. The assessment followed by virtue of the agreement, both of the taxpayer and the Commissioner, on the valuation of the Railroad's property. The only issue raised was the taxability, not the valuation or assessment, and since no question of valuation was involved there could be no appeal to arbitration. But since a determination of taxability was made by the Commissioner, that was a final ruling, order and judgment of the Revenue Commissioner. By the appeal in this case, it is not sought to review the assessment, but only to review the determination of taxability. Thus, section 92-8426.5 does not apply to this case because there is no attempt to review the assessment, but only the ruling of taxability. The validity. of the assessment, would depend upon the validity of the ruling of taxability.

If the words, "Shall not apply to assessments for ad valorem taxation against" a railroad embraces the determination of liability rather than simply the determination of property and value, then the law means that every taxpayer except a railroad has the right to appeal the legal determination of his liability for taxes to the superior court and a railroad is given the right to appeal to superior court only where the question of true value or amount is concerned, by demanding arbitration, and thereafter appealing to the court. Such a construction would mean that every taxpayer could have all questions of liability, property and values appealed to the superior court, except that railroads could not have the sole question of liability or taxability determined by the superior court on appeal, even though it, like all other taxpayers, could have all other questions determined by appeal to the superior court. As we view it, Section 92-8426.5 simply means that where questions of value or amount are involved, railroads shall have a right to demand arbitration before appealing to the superior court.

In the present case, there is no controversy between the commissioner and the railroad as to value and the word "assessment" is not used by the commissioner in making his determination of liability on May 26, 1950. The only question is that of determination of liability by virtue of the contention of the railroad that it is not subject to ad valorem taxes as such, but only to the tax fixed upon its net income by its charter. That the commissioner has the power to determine this question under section 92-8426.4 is without doubt and we do not believe that the language of section 92-8426.5 excludes the railroad from appealing this determination directly to the court.

It seems to us from all of the language used that a sound, common-sense construction of the provisions of the act of 1943, as codified in the sections referred to, and the provisions of section 45 of the 1938 Act, as codified, means that from a determination of liability the railroad may appeal directly to the superior court, and that the only exception to the right of appeal of any taxpayer is that where value or amount is involved upon a return of a public service corporation arbitration shall first be had before appealing to the superior court. Any other con-

struction leaves uncertain and indefinite how a railroad company, or similar body, can have its tax liability adjudicated in the courts. Why should that remedy be clouded or denied by a construction of language, which if susceptible of two constructions, ought to be construed as affording a clear, speedy, and direct path for the judicial determination of a taxpayer's liability?

While the taxpayer owes the State the duty of paying every tax legally imposed upon him, the State owes him a corresponding duty of good faith in providing a means of having a judictal determination of whether or not he is subject to the tax imposed. We are fortified in our determination of the issue under consideration by the fundamental conviction that it is right and just for the taxpayer to have this opportunity for an adjudication by the court of the question of taxability. From a study of the provisions of Title 92 of our Code, we are constrained to the view that there is no part of our law more perplexing and confusing than the Code provisions relating to procedures involved in the administration of those laws. There exists much confusion as to the matter of affidavit of illegality, and other procedure for a taxpayer of the kind here involved ... to raise the issue of taxability. The history of this litigation demonstrates that confusion. It is our belief, that one of the purposes of the 1938 and 1943 laws was to clarify rather than add to that confusion. We believe the construction herein placed · upon those sections will result in that clarification, and we therefore conclude that the railroad had the right to appeal from the decision of the commissioner to the superior court, and that this court has jurisdiction to determine the case now before us.

2. The majority of the court being of the opinion that the court does not have jurisdiction, a discussion of the other issues in the case would be of only academic interest. As written, my views on the fundamental principles involved are somewhat voluminous and it would be a useless burden upon the record to add them here. It is sufficient, therefore, for me to say that in my opinion the determination of liability for ad valorem taxation against the plaintiff in error in this case was erroneous.

It is by virtue of this conclusion that I concur in the judgment of reversal.

ORDER ON MOTION FOR REHEARING ENTERED JULY 24, 1951

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

DUCKWORTH, C. J.

ATKINSON, P.-J.

and JUDGE PHARR dissent.

LIBRARY SUPREME COURT, U.E.

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SEP 24 1951

IN THE

Supreme Court of The United States

October Term, 1951

NO. 1

GEORGIA RAILROAD & BANKING COMPANY,
Appellant,

VS.

CHARLES D. REDWINE, State Revenue Commissioner,

BRIEF FOR APPELLANT

ROBERT B. TROUTMAN
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Supreme Court of The United States

October Term, 1951

GEORGIA RAILROAD & BANKING COMPANY,
Appellant,

VS.

CHARLES D. REDWINE, State Revenue Commissioner,
Appellee

BRIEF FOR APPELLANT

PRELIMINARY STATEMENT

In view of the developments since this case was argued in February 1950, appellant has rewritten its brief to include such developments. This brief supersedes the brief and reply brief previously filed by appellant.

OPINION OF COURT BELOW

The opinion of the District Court is reported in 85 Federal Supplement 749.

JURISDICTION OF THE SUPREME COURT

The jurisdiction of the Supreme Coart is invoked under Title 28; U. S. Code, Sec. 1253, which provides for direct appeal to the Supreme Court from any action required to be heard and determined by a District Court of three Judges. The action is to enjoin the State Revenue Commissioner from collecting a tax from appellant on the grounds that the state statute under which such a tax is imposed is contrary to the Constitution of

the United States. Such action is required, by Title 28 U.S. Code, Sec. 2231, to be heard and determined by a District Court of three Judges, and was in fact heard and determined by a District Court of three Judges. Probable jurisdiction was noted December 5, 1949 (R. 195).

STATEMENT OF THE CASE

During the first part of the nineteenth century, the great problem of the State of Georgia was the development of inland transportation. The populated part of the State then consisted of a narrow strip along the seaboard and up the navigable rivers. It was universally believed that untold wealth lay in the interior, but the development of such wealth depended on the development of transportation. The State therefore undertook the building of canals and roads. It soon became apparent, however, that railroads were the proper answer to the problem. The State therefore turned all of its energies to the building of railroads. It employed an engineer to survey and plan railroads. It undertook the building of railroads with its own funds raised by the issuance of state bonds. In many other instances it subscribed to the stock in railroads. In a very large number of instances the bonds of railroad companies were guaranteed by the State, and in many such instances the State was required to make good on its guarantee. Cities were authorized to and did subscribe to stock of railroads or endorse their bonds.

In practically every case in which a railroad was built by private capital during this period the charter provided a contractual limitation on the power of the State to tax. There were about 30 charters containing such limitations. All but two have now been lost through merger or insolvency proceedings.

In 1832 the Charleston and Hamburg Railroad was built, under a charter granting tax exemption, from Charleston to Hamburg, S. C., opposite Augusta on the Savannah River. It was realized that this railroad would draw traffic away from Augusta and Savannah to Charleston unless similar transportation was provided by the State of Georgia.

Therefore, in 1833, Appellant, Georgia Railroad & Banking Company, was chartered by Special Act of the Legislature of Georgia approved December 21, 1832 (Georgia Laws of 1833, p. 256 et seq. App. i). That Act provided:

"The stock of said company and its branches shall be exempt from taxation for and during the term of seven years from and after completion of said railroads or any one of them; and after that shall be subject to tax not exceeding one-half percent per annum on the net proceeds of their princestment." (App. vi)

Both the Supreme Court of Georgia and this Court have held that that provision prevented the taxation, except as therein provided, of the lines and appurtenances of the railroad in which the capital stock was lawfully invested.

Prior litigation.

In 1874 the legislature of Georgia passed an act levying ad valorem taxes on railroads. Appellant resisted the tax. The Supreme Court of Georgia, in State of Georgia v. Georgia Railroad & Banking Co., 54 Ga. 423, held that the above provision was an irrevocable contract exempting the property of the railroad from tax except as provided therein, and that the Act of 1874, as applied against appellant, was unconstitutional and void as impairing the obligation of that contract, contrary to Art. I, Section 10, of the Constitution of the United States.

No further effort was made to tax the property of the railroad until 1902 when the State of Georgia, acting through its Comptroller General, again attempted to levy a tax on the property of appellant. Appellant then brought suit in equity in the Circuit Court for the Northern District of Georgia against William A. Wright, Comptroller General of Georgia.

That action was defended by the Attorney General of Georgia with the approval and direction of the Governor. The Attorney General not only resisted the injunction but affirmatively asked the court to consider and decide the questions involved in order that the defendant as an official of the State

of Georgia might know and perform his official duty. (R. 79, 83)

The Court, after hearing, held that the charter provision was an irrevocable contract, preventing the taxation of the property of Appellant except as therein provided and entered a decree permanently enjoining the defendant from levying and collecting any tax against the property described in the decree except as provided in the Charter (R. 84).

Georgia Railroad & Banking Co. v. Wright, 132 Fed. 912.

On appeal, this Court modified the decree by striking therefrom certain property which had been acquired by the railroad in a subsequent merger and affirmed the decree as so modified. (R. 131)

> Wright v. Georgia Railroad & Banking Co., 216 U. S. 420.

The state then attempted to levy a tax against the property in the hands of the lessees. That attempt was also enjoined; and this Court, on appeal, affirmed.

Wright v. Louisville & Nashville Railroad Co., 236 U. S. 687

Constitution of 1945

Thereafter no efforts were made to tax the Railroad until 1945. At that time the State of Georgia adopted an amendment to its Constitution providing:

"All exemptions from taxation heretofore granted in corporate charters are declared to be henceforth null and void."

(App. xxxiv)

Acting under that section, the State Revenue Commissioner threatened to levy and collect taxes against the property of Appellant from 1939 to date.

Appellant brought suit in the Superior Court of Fulton County, Georgia, against the State Revenue Commissioner for declaratory judgment and to enjoin the threatened levy and collection, which seemed to Appellant the clearest remedy under the Georgia law. The Superior Court decided in favor of the Railroad and the Commissioner appealed. The Supreme Court of Georgia held that the remedy was not available to Appellant and ordered the action dismissed on that ground without intimating any opinion on the merits. The Supreme Court of Georgia expressly refused to intimate an opinion on what remedy, if any, was available to Appellant in the Courts of Georgia, although requested to do so. Musgrone v. Georgia Railroad & Banking Co., 204 Ga. 139. This Court dismissed an appeal on the ground that the judgment of the Supreme Court of Georgia was based upon a non-federal ground adequate to support it. Georgia Railroad & Banking Co., v. Musgrove, 335 U. S. 900.

There being no apparent remedy in the courts of Georgia, Appellant then brought suit in the District Court of the United States for the Northern District of Georgia against the State Revenue Commissioner, to enjoin the threatened levy and collection on the grounds that the threatened action would impair the obligation of the contract and would deprive Appellant of its property without due process of law. The complaint further prayed that the prior final decree of the federal court, as modified and affirmed by this Court, be enforced.

A three-Judge Court was convened as provided in Sec. 2281 and Sec. 2284 of the Judicial Code. Appellee filed motion to dismiss (R. 9, 15). Appellant filed motion for judgment on the pleading, or for a summary judgment, or in the alternative for an interlocutory injunction (R. 161).

Judgment of District Court.

The three-judge court, after argument, sustained the motion to dismiss on the ground that the action was against the State of Georgia within the prohibition of the 11th Amendment of the Constitution of the United States. (R. 170) One Judge dissented on the grounds that the Court had jurisdiction to enforce its prior degree and that all questions presented were precluded by the prior decree. (R. 180)

Proceedings in this Court.

In the oral argument before this Court on February 13, 1950, counsel for appellee said that the judgment of dismissal should be affirmed because there was a plain, speedy and efficient remedy available to Appellant in the courts of Georgia. The Court asked counsel what such remedy was. He replied that such remedy was by appeal from the assessment of the State Revenue Commissioner to the proper Superior Court of Georgia. Appellant, on the other hand, insisted that such remedy was not available to Appellant, or if it were it certainly was not "plain".

This Court, on February 20, 1950, entered the following order:

"Per Curian: Inasmuch as the Attorney General of Georgia stated at the bar of this Court that plain speedy and efficient state remedies were available to appellant, the cause is ordered continued for such period as will enable appellant with all convenient speed to assert such remedies."

In obedience to that mandate Appellant, with all convenient speed, took an appeal from the assessment of the State Revenue Commissioner to the Superior Court of Richmond County, Georgia, and thence to the Supreme Court of Georgia.

The Supreme Court of Georgia, on its own motion, held that the remedy of appeal was not available to Appellant and ordered the case dismissed for want of jurisdiction. Three of the Judges dissented on this point, stating that since there was no other remedy available to Appellant under the law of Georgia they would not impute to the legislature an intent to deny Appellant all remedy but would construe the Act of 1943 as not withdrawing such remedy. One of the Judges stated that he would decide the case on its merits in favor of Appellant. The other Justices said that, since the case was ordered dismissed for want of jurisdiction, they would not intimate any opinion on the merits. Georgia Railroad & Banking Co. v. Redwine, 66 S. E. (2d) 234.

Having fully, and fruitlessly, complied with the mandate of this Court of February 20, 1950, Appellant has moved the court to terminate the continuance and to decide the case.

SPECIFICATION OF ERRORS

The court below erred in dismissing the petition, and in not entering a summary judgment or a judgment on the pleadings o in favor of appellant, for the reasons that (a) the action was not against the state, (b) the court had jurisdiction to enforce its prior final decree and permanent injunction affirmed by this Court, (c) appellee was concluded by the prior final decree affirmed by this Court, (d) the taxes sought to be collected and the statutes under which they were imposed are contrary to Sec. 10 of Article I of the Constitution of the United States in that they would impair the obligation of the contract, and (e) the dismissal of the complaint, unless reversed, will result in appellant's being deprived of its property without any opportunity for a hearing and without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, as is more fully set out in the assignments of error I through 9 (R. 191).

SUMMARY OF ARGUMENT

An action to enjoin the collection of a state tax on the grounds that the law of the state under which the tax is levied is contrary to the Constitution of the United States is not an action against the state within the meaning of the Eleventh Amendment. This Court has repeatedly so held. This Court has so held in the precise situation here presented, that is, in an action to enjoin the tax on the grounds that the law levying the tax impairs a contract of the state contrary to the Constitution of the United States. Allen v. B. & O. Railroad, 114 U. S. 311.

Appellee admits that the statute as construed by the Supreme Court of Georgia deprives Appellant of its property without due process of law because the Georgia statute provides no remedy for contesting the taxability of the property. This

Court has repeatedly held that an action to enjoin a state official from enforcing a state statute on the grounds that such statute deprives the complainant of property without due process of law is not a suit against the State within the prohibition of the Eleventh Amendment.

Moreover, the complaint also prays that the former final decree as modified and affirmed by this Court be carried out and enforced. This Court has held that where, as was the case in the prior litigation in the Federal Court, the State through its duly authorized officials, to protect its interest, assumes the defense of the action against one of its officials and asks affirmative relief of the Federal Court, the State and its subsequent officials are bound by the final decree, and the Federal Court has ancillary jurisdiction to enforce such decree against any subsequent official of the State. Gunter v. Atlantic Coast Line Railroad, 200 U.S. 273.

Moreover, the greater portion of the asserted tax is claimed by the several counties and cities. Appellee is acting in their behalf in seeking to collect such tax, just as he is purporting to act on behalf of the State in collecting the part of the tax claimed by the State. If the suit is against the State in regard to the tax claimed by the State, then equally it is against the cities and counties in regard to the tax claimed by them.

The cities and counties have no immunity from suit; and the Court has jurisdiction to enjoin at least the collection of the tax claimed by them.

The officer enjoined by the prior decree was also attempting to collect tax for the cities and counties. The prior decree specifically enjoined the collection of any county or municipal tax contrary to the decree. Both this Court and the Supreme Court of Georgia have decided that a decree against an officer acting on behalf of a city or county is binding against subsequent officials acting in the same capacity.

One of the counties involved, Talkaferro County, formally intervened in the prior action, and was by order made a formal party, and participated in the appeal to this Court. It

certainly is bound by the prior decree, and the District Court certainly has ancillary jurisdiction to enforce that decree against Taliaferro County and against any person attempting to collect on behalf of Taliaferro County the tax enjoined by the prior decree.

The prior decree is conclusive on the validity and effect of the contract of exemption, not only as against the arguments there inade against it, but on all arguments that could have been there urged against it.

The prior judgment of the Supreme Court of Georgia in State of Georgia v. Georgia Railroad & Bunking Co., 54 Ga. 483, is also res judicata and conclusive on the validity and effect of the contract of exemption.

Even if those decisions were not res judicata, they, and the many other decisions of this Court and of the Supreme Court of Georgia, should be followed as stare decisis.

The reasons urged by appellee against the validity of the contract are not well founded, even if the questions had not been decided.

Therefore, the District Court should have not only overruled the motion to dismiss, but should have granted Appellant's motion for a summary judgment or a judgment on the pleadings.

BRIEF OF LAW AND ARGUMENT

Action Is Not Against the State.

This Court has repeatedly held that an action to enjoin state officials from collecting a tax on the grounds that the tax is contrary to the Constitution of the United States is not an action against the state within the meaning of he eleventh amendment.

Looney v. Crane Co., 245 U. S. 178, and cases there cited

This Court has held specifically that the action is not against the state where the injunction is sought on the grounds that the threatened action would impair the obligation of a contract to which the state is a party.

> Allen v. B & O Railroad, 114 U. S. 311.

Gunter v. Atlantic Coast Line R. R., 200 U. S. 273.

Board of Liquidation v. McComb, 92 U. S. 531.

This Court has in many other cases affirmed injunctions against state officials enjoining them from collecting taxes from a railroad company on the grounds that such action would impair a contract of exemption entered into by the state, both the parties and the court considering the question too well settled to require discussion.

Wright v. Georgia Railroad & Banking Co., 216 U. S. 420.

> Wright v. L & N Railroad, 236 U. S. 687.

Wright v. Central of Georgia Railroad, 236 U. S. 674.

Powers v. Detroit & Grand Haven Railway, 201 U. S. 543.

> Wright v. Sills, 2 Black 544.

Humphrey v. Pegues, 16 Wall 244.

Tomlinson v. Branch, 15 Wall 460.

Dodge v. Woolsey, 18 Howard 331. This Court has recently, in Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, reviewed the cases and restated the rule in regard to suits against the sovereign (p. 689):

"... where the officers' powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do. Or he is doing it in a way which the sovereign has forbidden. His actions are ultra vires his authority and, therefore, may be made the object of specific relief . . .

"A second type of case is that in which the statute or order conferring power upon the officer to take action in the sover-eign's name is claimed to be unconstitutional. Actions for habeas corpus against the warden and injunctions against the threatened enforcement of unconstitutional statutes are familiar examples of this type. Here, too, the conduct against which specific relief is sought is beyond the officer's power and is, therefore, not the conduct of the sovereign. The only difference is that in this case the power has been conferred in form but the grant is lacking in substance because of its constitutional invalidity.

"... the action of an officer of a sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so 'illegal' as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory power or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void." (p. 701)

This rule is elaborated and the cases collected in the excellent dissenting opinion of Mr. Justice Frankfurter, concurred in by Mr. Justice Burton (337 U. S. 705). The distinction is there made crystal clear between the cases in which the plaintiff merely seeks to enjoin the State official from taking unconstitutional action, and those cases in which the plaintiff seeks to require the officer to set in motion the machinery of government, or to require the transfer of money or property belonging

to the State. In the former the action may be maintained; in the latter it may not.

The rule laid down by his Court in the Larson case is well illustrated by a comparison of Allen v. B & O Railroad Co., 114 U. S. 311, and In re Ayers, 123 U. S. 443, both opinions written by the same Justice and involving the same contract.

In the Allen case the State of Virginia had issued bonds providing that coupons would be receivable in payment of all taxes. Subsequently the state attempted to repudiate its contract. The railroad had tendered coupons in payment of tax. Notwithstanding the tender, and in violation of the contract, the state official attempted to enforce the taxes. The railroad brought action in the federal court to enjoin the collection of the taxes. This Court held that the action was not against the state and that the injunction was properly granted.

In the Ayers case, the State of Virginia had passed a law directing the Attorney General to bring action in the State Court against taxpayers who had tendered the coupon in payment of taxes to recover such taxes and to require the taxpaye 's in such cases to prove that the coupons were genuine and not spurious. The plaintiff in that case was a resident of England who had bought coupons for resale at a profit. No effort had been made to collect any taxes from him or to disturb his property in any way. He brought an action in the federal court, alleging that the action of the Attorney General made his coupons less desirable and depreciated their value, and praying that the Attorney General be enjoined from instituting any action in the name of the State of Virginia and be required to dismiss such actions which he had already brought. Clearly that suit sought to control the action of the Attorney General in his official capacity and not as an individual acting beyond his authority. Bringing or dismissing an action in the name of the state was, of course, an offical act within the scope of his authority, whether such actions were well founded or not. This Court, therefore, held that the action was in effect against the state and could not be maintained.

This action clearly falls within the ambit of the Allen, Gunter

and similar cases. Appellant does not ask that appellee be required to do any act in his official capacity. It does not seek to impair or interfere with any funds or property of the State. It is entirely defensive in purpose and effect. It merely prays that appellee be enjoined from seizing the property of Appellant under a state statute which is, as to Appellant, clearly unconstitutional. Since the State statute purporting to authorize appellee to seize Appellant's property is unconstitutional, appellee has not been validly authorized by the State of Georgia to seize Appellant's property and appellee is, therefore, acting as an individual wrongdoer and not as a representative of the State in such threatened seizure.

Appellant has been denied due process of law.

Moreover, the complaint also sought to enjoin the levy and collection of the tax on the grounds that Appellant was threatened with a deprivation of its property without due process of law. Appellee has solemnly admitted in judicio that the Georgia statutes, as now construed by the Supreme Court of Georgia, do deny due process of law. In his motion for rehearing to the Supreme Court of Georgia, he said:

"In deciding sua sponte that the Act of 1943, supra, took away the only available method open to the Railroad to review judicially the question of its taxability ad valorem, the court overlooked and failed to decide, as movant insists it should have done, whether the Act of 1943 was in this respect unconstitutional as denying to the Railroad due process of law in violation of the Fourteenth Amendment to the Federal Constitution and that of the State Constitution, Art. I, Sec. I, Par. III (Code Sec. 2-103)."

And in his brief in support of that motion he said:

"The construction placed upon the Act of 1943 takes away. from the Railroad the only remaining method for judicial determination of questions of taxability. Therefore, if the meaning of the Act of 1943 is correctly construed it is to that extent unconstitutional as violating the due process

clause of the Fourteenth Amendment to the Federal Constitution and of Article I, Sec. I, Paragraph III of the Constitution of Georgia."

This Court has decided that "the assessment of a tax is action judicial in its nature requiring for the legal exertion of the power such opportunity to appear and to be heard as the circumstances of the case require" and "that due process of law requires that after such notice as may be appropriate, the taxpayer have opportunity to be heard as to the validity of the tax." Central of Georgia Railway v. Wright, 207 U. S. 127; Turner v. Wade. 254 U. S. 64. The failure of the State to provide a judicial remedy renders the State exaction unconstitutional and void, and the Federal Court will enjoin on the ground. Oklahoma Operating Co. v. Love, 252 U. S. 331; Ex Parte Young, 209 U. S. 123.

This Court has held in innumerable cases, and the principle was reaffirmed as recently as Alabama Public Service Co. v. Southern Ry. Co., 341 U.S., 71 S. Ct. 762, Note 4, decided May 21, 1951, that the Eleventh Amendment does not prevent a suit to enjoin a state official from enforcing a state statute on the grounds that such statute or the threatened action thereunder would deprive the complainant of property without due process of law.

The Court has ancillary jurisdiction to enforce its own prior decree.

Moreover, this Court held, in Gunter v. Atlantic Coast Line Railroad, 200 U. S. 273, that where suit is brought against a state official to enjoin the collection of a tax, and the State, through its duly authorized officers, to protect and enforce the rights of the State, undertook the defense of the suit, the State was bound by the decree as fully as if it had been a party to the record and that the Federal District Court which rendered the decree had ancillary jurisdiction to enforce such decree against the subsequent officials of the State. In that

See the cases collected in Note 3, 337 U. S. 710.

case a stockholder of the railroad had previously brought suit in the federal court to enjoin a County Treasurer from collecting tax from the railroad on the ground that the property was exempt from tax under a contractual exemption in its charter. The Attorney General of South Carolina, as authorized by South Carolina law, undertook the defense of the suit. A final decree and injunction was entered. Some thirty years later the State of South Carolina passed a law requiring the property to be taxed and directing the Attorney General to bring action. to enforce the tax. The railroad then filed ancillary proceedings in the same cause asking the court to enforce its prior decree by restraining the Attorney General from prosecuting the action. The court did enjoin the Attorney General and this Court affirmed, holding: (1) that since the state, through its duly authorized officer, had undertaken the defense of the prior action, it and its subsequent subordinate officials were bound by the prior decree and injunction; (2) that the District Court, therefore, had ancillary jurisdiction to enforce that decree and injunction against the state and against all subsequent officials of the state, and (3) that the prior decree conclusively adjudicated that the contract of exemption was valid, not only as against all objections here urged, bu as against all objections that could have been there urged.

This is but an application of the settled principle that a judgment is binding not only as against parties to the record but also against any person interested who employs counsel or otherwise openly defends the action.

"One who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly to the knowledge of the opposing party, is as much bound by the judgment and as fully entitled to avail himself of it as an estoppel against the adverse party as he would be if he had been a party to the record."

Souffront v. Campagne des Secreries, 217 U. S. 475, 487. This principle is equally as applicable to the soverign.

"If the United States in fact employs counsel to represent interest in a litigation or otherwise actively aids in its conduct, it is properly enough deemed to be a party and not a stranger to the litigation and bound by its result."

Drummond v. United States, 324 U.S. 316, 318.

The District Court in its opinion distinguishes the Gunter case on the grounds that the Attorney General of Georgia was not authorized to represent Wright in the prior action or to file answers in his behalf, but exceeded his authority. This requires a consideration of the provisions of the laws of Georgia then in force. These are set out in the appendix, page xxxiv et seq.

The Code of 1895, then in force, provided:

"It is in the discretion of the Comptroller General to require the Attorney General, when the services of a Solicitor General are necessary in collecting or securing any claim of the State, in any part of the State; either to command the services of said Attorney General in any and all such cases, or the Solicitor Generals in their respective circuits."

Sec. 222, Code of 1895.

"It shall be the duty of the Attorney General . . . to represent the State . . . in all civil and criminal cases in any court when required by the Governor."

Sec. 220, Code of 1895.

"When any suit is instituted against the State or against any person, in the result of which the State has an interest under pretense of any claim inconsistent with its sovereignty, jurisdiction or right, the Governor shall, in his discretion, provide for the defense of such suit unless otherwise specially provided for."

Sec. 23, Code of 1895.

The Attorney General, in his official capacity, acknowledged service (R. 41) and filed answers for the Comptroller General (R. 75, 81). His answer not only defends Wright personally, but affirmatively "prays the court, since it now has jurisdiction of this entire case, in order that respondent may properly exercise his duty in the premises as Comptroller General, that this Court will construe Section 15 of the charter of complainant, or so much thereof as relates to the subject of taxation," (R. 80) and further "that said Section should be construed, and if found to protect any of the present property of complainant from property taxation, defendant should be adjudged free to assess and tax such property and values as are not so protected, from year to year, under such machinery as is by the laws provided." (R. 83)

There can be no doubt that the Comptroller General considered the services of the Attorney General "necessary in collecting or securing the claim of the State" and "commanded the services of the Attorney General." Nor can there be any doubt that the submission of the issue to the Federal Court was with the full knowledge and approval of both the Governor and the legislature. Governor Hoke Smith, in his message to the legislature in 1908, said that there was then pending the case between Appellant "and the State, in which I hope a decision will be rendered which will define the State's right to collect taxes from it." He then detailed at some length the contentions of "the State." In 1913 the legislature passed a

^{1&}quot;Litigation has been pending, off and on, for years between the State and the Georgia Railroad and Banking Company, growing out of a provision in its original charter upon the subject of taxation. There will probably be heard this Fall before the Supreme Court of the United States the case between that Company and the State, in which I hope a decision may be rendered which will define the State's right to collect taxes from it.

[&]quot;The State says:

[&]quot;First, that a correct construction of the original charter of the Georgia Railroad and Banking Company exempted only the stock of the Company from taxation.

[&]quot;Second, that if this view is not sound, still the investment other than the original capital is subject to taxation. Success even to this extent would subject \$9,000,000 of property belonging to this Company to taxation.

[&]quot;We should seek no injustice to railroad companies, but they ought to bear part of the burdens of government. They ought not to be relieved from taxation, leaving thereby extra burdens upon the private citizens, unless clearly exempt by contract binding upon the State,"

resolution reciting that John C. Hart, counsel for defendant in the prior litigation, was "under contract with the State of Georgia to represent the State in certain suits for taxes brought against several railroad corporations of this State, his compensation being conditional on recovery," and that he had been appointed Tax Commissioner, and resolving that his acceptance would not affect that contract. That contract obviously referred to the litigation against this Appellant and other railroads similarly situated, which was then proceeding against the lesses in an effort to tax the property in their hands. Wright v. L & N Railroad Co., 236 U. S. 687.

The Georgia Courts have held that when the Attorney General takes legal action, it will be presumed that he was authorized to do so by the Governor. Alexander v. State, 56 Ga. 479. The Georgia courts have further held that when the Attorney General assumes the defense and files an answer in an action to enjoin the collection of a claim of the State, the State becomes for all practical purposes a party to the action. Mayo v. Renfroe, 66 Ga. 408. In that case the plaintiff brought suit to enjoin the sheriff from collecting an execution issued by the Governor for money due the State. The action was defended by the Attorney General. The objection was made that the

¹WHEREAS, it is announced that the Honorable John C. Hart of the County of Greene will be appointed by His Excellency, the Governor, Tax Commissioner of this State in accordance with an Aci this day approved, and that the said John C. Hart has signified his willingness to accept said appointment, and

WHEREAS, The said John C. Hart is now under contract with the State of Georgia to represent the State in certain suits for taxes brought against several railroad corporations of this State, his compensation being conditional upon recovery, and,

WHEREAS, His duties as Tax Commissioner would in no wise conflict with his performance of his part of the contract or contracts aforesaid, it is,

Resolved by the General Assembly of Georgia, That it is the sense of the General Assembly that the acceptance on the part of the Honorable John C. Hart of the office of Tax Commissioner of this State and his performance of the duties of said office should and will conflict in no wise with any contracts existing between the said John C. Hart as attorney, and the State of Georgia; and,

Further, That the appointment of the said John C. Hart to the office aforesaid and his acceptance of same will not and should not nullify or void the future operation of said contracts.

Approved August 16, 1913.

State or the Governor was an indispensible party. The court held that since the action was defended by the Attorney General the State was for all practical purposes a party.

"Besides it is made his [the Governor's] duty to defend suits against any person where the state is interested. Code Sec. 22, 74; and this has been done in this case—the attorney general filed the demurrer for the sheriff, and the governor is in through his legal adviser and representative for all practical purposes, and in the only way in which he could well appear for the state." Mayo v. Renfroe, 66 Ga. 408, 427.

It is not necessary to argue, as appellee seems to think, that the Governor or the Attorney General would have had authority to consent to a suit avowedly against the State, such as a suit seeking a money judgment against the State. There is, we submit, a clear distinction between a suit in which the plaintiff is attempting to recover money or property from the State, in which the position of the State is purely defensive, such as Ford Motor Co. v. Department of Treasury, 323 U.S. 459, and a case, such as this, where the State is seeking to collect a claim from the other party and the other party is merely defending himself against an unconstitutional exaction.

It is Appellant's position that when a suit is brought to enjoin a State official from seizing property to collect an unconstitutional claim of the State, the State may, if it desires, leave the officer to fend for himself. In such case the judgment will be against the officer personally and the State may not be bound. But the State, may, for the purpose of enforcing its claim, intervene, assume the defense and ask the court to decide the issue in order that it may collect its claim. In that case the judgment is binding in favor of or against the State as fully as if it had brought the suit to collect the claim.

It will not be denied, we assume, that the Governor and the Attorney General were authorized to bring suit on behalf of the State to enforce a claim of the State. Alexander v. State, 56 Ga. 479; Trust Company of Georgia v. State of Georgia, 109 Ga. 736. No reason appears why they could not intervene and assume the defense of a pending suit and ask that the issue

be decided in that case, in lieu of bringing an independent suit. The State is equally bound in either case. Gardner v. New Jersey, 329 U. S. 565; Clark v. Barnard, 108 U. S. 486. In the Gardner case the Comptroller of the State of New Jersey filed, in a reorganization proceeding of a railroad, a claim for taxes claimed to be due the State from the railroad. The trustee filed objection to the taxes on various grounds. The State then attempted to withdraw its claim, contending that the objections filed by the trustee were in effect a suit against the State. This Court overruled the objection, saying:

"The State is seeking something from the debtor. No judgment is sought against the State."

So in this case, the State is seeking to collect taxes from Appellant. Appellant is seeking nothing from the State.

Omptroller "to institute and direct prosecution . . . for just claims and debts due the state" and the Attorney General to "attend generally to all matters in which the state is a party or in which its rights and interests are involved." This Court held that such authorization was sufficient to authorize them to submit the claim of the State to the Federal Court so as to be bound by the judgment therein. Surely the statutes of the State of Georgia are broader and more explicit than the state gratutes involved in that case.

In this case the Governor and the Attorney General were specifically authorized, and in fact required, to assume the defense of the prior action in order to protect and enforce the claim of the State. Sec. 23 of the Code of 1895 expressly requires the Governor, when any suit is brought against any person in which the State has an interest in protecting a claim of the State, to provide for the defense of such suit, and Sec. 220 requires the Attorney General to represent the interest of the State in any court when required by the Governor.

Most of the tax sought to be enjoined is city and county tax.

More than 85% of the tax sought to be enjoined in this case

was levied by and is payable to the several cities and counties. Under the Georgia law, the governing bodies of the cities and counties fix the rate and levy the tax on all property within their jurisdiction. They then inform the State Revenue Commissioner of the rate of tax so levied. He values the property of railroad companies within each city and county and applies the rate of tax fixed by such city and county to the value determined by him. The tax thus determined is payable to the local tax collectors. If the railroad fails to pay the tax the State Revenue Commissioner issues an execution which is then turned over to the local sheriff for levy. Ga. Code of 1933, Sec. 2702, 2703, 2704, 2705, App. xxiii-xxiv.

The State Revenue Commissioner thus acts on behalf of the several cities and counties in regard to the city and county taxes in exactly the same manner as he acts on behalf of the State in regard to the state taxes.

If a suit to prevent the official from assessing the tax i vied by the State can be said to be a suit against the State, then it follows that the suit, as far as it seeks to enjoin the assessment of the tax on behalf of the cities and counties, is equally a suit against such cities and counties.

Cities and counties ave no constitutional immunity from suit. Lincoln County Luning, 133 U. S. 529; Chicot County v. Sherwood, 148 U. S. 529. Where a public officer or agency is acting both on behalf of the State and of a municipal corporation, the Court has jurisdiction to grant full relief insofar as it affects the rights or claims of the municipal corporation, even though the Court would be without power to require affirmative action in regard to the rights or property of the State. Hopkins v. Clemson College, 221 U. S. 631; Port of Seattle v. Oregon & W. R. R., 255 U. S. 56.

Therefore, the Court certainly has jurisdiction and the suit should proceed for the purpose of enjoining the assessment of the tax claimed by the cities and counties.

William A. Wright, the Comptroller General who was defendant in the prior action in the Federal Court, acted on behalf

of the cities and counties in precisely the same capacity as appellee is now acting. Appellee is in all respects the successor in office of Wright in regard to the assessment of ad valorem taxes against railroads.

The prior final decree, affirmed by this Court, expressly enjoined the levy and collection of any "county or municipal tax" not in accordance with that decree (R. 132).

Regardless of the uncertainty that may exist as to the extent to which a suit against a person purporting to act on behalf of a state is binding on his successor in office, because of constitutional limitations, there is no such uncertainty in fegard to a decree against a person acting on behalf of a city or county. In such case both this Court and the Supreme Court of Georgia have held that the successors in office of such person are equally bound by the decree. New Orleans v. Citizens Bank, 167 U. S. 371, 388; Thompson v. U. S., 103 U. S. 480; Maddox v. Lithonia Banking Co., 166 Ga. 616; Coleman v. Fields, 142 Ga. 205.

Therefore, the cities and counties, which levied more than 85% of the tax sought to be enjoined, are clearly bound by the prior decree and the Court clearly has jurisdiction to enforce that decree as against the city and county taxes, regardless of whether the State of Georgia is bound thereby.

Court certainly has jurisdiction to enjoin tax claimed by Taliaferro County.

Moreover, one of the counties which is seeking to levy a tax against Appellant—Taliaferro County—employed counsel and formally intervened in the prior action and was by order of Court made a formal party of record. It filed defensive pleadings and participated in the appeal to this Court (R. 61-72). Certainly Taliaferro County is barred and concluded by the decree; and the District Court certainly has jurisdiction to enforce its prior decree against Taliaferro County.

Counsel for Taliaferro County was Hon Samuel Sibley, later Chief Judge of the Court of Appeals for the Fifth Circuit, now retired.

Prior decree conclusive on all contentions.

A final decree upholding and enforcing a contract of exemption is conclusive on the validity and effect of the contract not only against the contentions urged against it but against all contentions that could have been urged against it. In such case the Court must necessarily decide (1) that the contract is valid, and (2) that it applies to the property sought to be taxed. It is of course settled that a judgment is conclusive on the issues which were necessarily decided in order to enter the judgment. In short, the "issue"—the "matter decided"—is the validity of the contract and not the arguments pro and con on its validity. Gunter v. Atlantic Coast Line, 200 U. S. 273; Deposit Bank v. Frankfort, 191 U. S. 499; New Orleans v. Citizens Bank, 167 U. S. 371.

Prior judgment of the Supreme Court of Georgia is res judicata.

The judgment of the Supreme Court of Georgia in State of Georgia v. Georgia Railroad & Banking Co., 54 Ga. 423, is also res judicata on the validity and effect of the contract of exemption. In that case the State issued and levied an execution on the property of the Railroad for taxes claimed to be due. The Railroad filed affidavit of illegality, the remedy then provided by statute, on the grounds that the provision of its charter was an irrevocable contract preventing the taxation of its property except as therein provided and that such contract could not be impaired by any subsequent statute of the State of Georgia. The Supreme Court of Georgia held, in a unanimous opinion, that the provision of the charter was an irrevocable contract, that the legislature was authorized to grant such contract, that it had not been lost or impaired by any subsequent act, and that such contract could not be impaired under the Constitution of the United States.

In order to decide that case in favor of Appellant, the Supreme Court of Georgia necessarily had to decide, and did decide, (1) that plaintiff had a valid irrevocable contract, (2)

that such contract prevented the taxation of the property sought to be taxed, and (3) that such contract could not be impaired by any statute of Georgia under the Constitution of the United States. Appellant submits that that decision is res judicata and controlling on the points so lecided, not only on the arguments there made but on the arguments that could have been there made on that issue.

Appellant recognizes that the effect to be given to a judgment of the State Court is determined by the state law, and that the Federal Courts will give no more effect to a State Court judgment than is given to such judgment in the State Court. Appellee contends that under the law of Georgia a judgment in regard to one year's taxes can never be resjudicate in regard to another year's taxes, even on the precise points necessarily and actually decided. That contention has been ruled against appellee in Coleman v. Fields, 142 Ga. 205.

Appellee relies for his contention on Georgia Railroad & Banking Company v. Wright, 124 Ga. 596. In that case the judgment pleaded as res judicata was not a prior judgment of the State Court but was a prior judgment of the Supreme Court of the United States. There the Railroad had previously brought suit in the Federal Court to enjoin the levy and collection of a tax on stock owned by the Railroad in the Western Railroad of Alabama, on the ground that such stock was within the contract of exemption. This Court held that such stock was not within the contract of exemption. That was the only point decided by this Court. Thereafter the Railroad brought an action in the State Court to enjoin the tax on the stock for a later year, not on the grounds of the contract of exemption, but on the grounds that the State was systematically discriminating against the Railroad in not taxing other similar property and on other grounds having no relation to the contract of exemption. The Supreme Court of Georgia properly held that the prior decision of this Court, holding only that the stock was not within the contract of exemption, was not res judicata on a subsequent action resisting the tax for a different year on a wholly different reason.

Such holding was obviously sound. For example, if the Appellant should lose this case on its merits, it would be barred from thereafter contending that the property was exempt from tax under its charter, but surely it would not be forever barred in all subsequent years from resisting any tax the State might see fit to impose, on the ground that its property was being over-valued, or on the grounds that its property was being systematically valued higher than other similar property, or on any other grounds not related to the contract of exemption. That was all the Supreme Court of Georgia held in the 124th Georgia.

The prior decree pleaded as res judicata in that case was a decree of the Federal Court affirmed by this Court. The Supreme Court of Georgia very properly recognized that the effect to be given to such decree was governed by the decisions of this Court and cited and relied on the decisions of this Court, which it quoted as follows:

"The two suits are for distinct and separate causes of action. If there were any distinct question litigated and settled in the prior suit, the decision of the court upon that question might raise an estoppel in another suit upon the principle stated in Cromwell v. County of Sac, 94 U. S. 351. But, as was held in that case, where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates us an estoppel only as to those matter in issue or points controverted, upon the determination of which the finding or verdict was rendered." (Georgia Railroad & Banking Co. v. Wright, 124 Ga. 596, 604.)

That quotation makes it clear that the Supreme Court of Georgia considered that the prior decree was res judicata in subsequent years on the issue of the validity and effect of the contract of exemption, actually made and decided in the prior action. That is clear from the above quotation, and is even clearer by reference to the other contemporaneous controlling decisions of this Court on the exact point. Deposit Bank v. Frankfort, 191 U. S. 499, 513; Gunter v. Atlantic Coast Line,

200 U. S. 273, 290; New Orleans v. Citizens Bank, 167 U. S. 371.

Moreover, the Supreme Court of Georgia in the subsequent case of Coleman v. Fields, 142 Ga. 205, specifically held that a judgment on the right to tax was res judicata in regard to subsequent years' taxes involving the same right to tax. In that case the taxpayer brought an action to enjoin the Board of Education from levying a tax on the grounds that the election authorizing the tax was void. He later brought an action to enjoin the sheriff from collecting the tax for a subsequent year. The Supreme Court of Georgia held that the judgment in the first case was res judicata and precluded a reexamination of the issues, saying:

"It was contended that the suit to enjoin the levy of the ! tax related merely to the tax for one year, while the suit to enjoin collection of the tax related to taxes for another year. and on that account the subject-matters of the suits were different and the former judgment would not be conclusive; citing Georgia Railroad & Banking Co. v. Wright, 124 Ga. 596 (53 S E., 251); 28 Cyc. 1182(b); Keokuk &C. R. Co. v. Missouri, 152 U. S. 301 (14 Sup. Ct. 592, 38 L. Ed. 450); Davenport v. Rock Island R. Co., 38 Iowa, 633-40. But this takes an unduly restricted view of the scope of the judgment in the former case. While in the first suit it was prayed that the officers be enjoined from levying the tax, the scope of the action was broader, and sought a decree declaring the election and the law void, so that no tax could be levied thereunder. This attack was not directed against the levy of a tax for one year any more than another year, but went to the right of the county to tax at all. This right to tax lies at the to, foundation of the second action, and upon that controlling question Coleman was concluded by the former judgment." (Coleman v. Fields, 142 Ga. 205.)

The decision of the Supreme Court of Georgia in the 142nd Georgia is the later case and is a unanimous opinion, and if there is any conflict between it and the 124th Georgia, then of

course the 124th Georgia is to that extent overruled and the 142nd Georgia is the controlling authority.

The statement of this Court in Wright v. Georgia Railroad & Banking Co., 216 U. S. 420, 429, to the effect that a judgment of a Georgia Court cannot be res judicata in regard to subsequent years' taxes, even on the precise point cecided, is based solely on Georgia Railroad & Banking Co. v. Wright, 124 Ga. 596, discussed above. As pointed out above, that decision of the Supreme Court of Georgia did not deal with the effect of a State Court judgment but with the effect of a judgment of this Court; and any suggestion in that decision that the final judgment of the Georgia Court on the right to tax would not be binding in regard to taxes for subsequent years, even on the same right to tax, is dispelled by the subsequent decision of Coleman v. Fields, 142 Ga. 205, which states the controlling Georgia law.

Other decisions upholding contract

Those cases were not by any means the only decisions in which this and similar charter provisions granted by the legislature of Georgia were upheld and enforced. There were many other decisions of this Court and of the Supreme Court of Georgia upholding and applying such provisions, including:

> Rome Railroad Co. v. City of Rome, 14 Ga. 275.

City Council of Augusta v. Georgia Railroad & Banking Co., 26 Ga. 651.

Ordinary of Bibb Co. v. Central Railroad & Banking Co., 40 Ga. 646.

State of Georgia v. Georgia Railroad & Banking Co., 54 Ga. 423:

Western & Atlantic Railroad v. State, 54 Ga. 428.

Central Railroad & Banking Co. v. State, 54 Ga. 401. Central Railroad & Banking Co. v. Georgia, 92 U. S. 665.

Goldsmith v. Rome Railroad Co., 62 Ga. 473.

Goldsmith v. Georgia Railroad Co., 62 Ga. 485.

Goldsmith v. Augusta & Savannah Railroad Co., 62 Ga. 468.

> Goldsmith v. Central Railroad Co., 62 Ga. 509.

> Wright v. Southwestern Railroad, 64 Ga. 783.

> Southwestern Railroad v. Wright, 68 Ga. 311.

Southwestern Railroad v. Wright, 116 U. S. 231.

State of Georgia v. Southwestern Railroad, 70 Ga. 11.

Wright v. Georgia Railroad & Banking Co., 216 U. S. 420.

Wright v. Louisville & Nashville Railroad
236 U. S. 687.

Wright v. Central of Georgia Railway, 236 U. S. 674.

Central of Georgia Railway v. Wright, 248 U. S. 525, On rehearing 250 U. S. 519.

City Council of Augusta v. Augusta-Aiken Ry. & Elec. Corp., 150 Ga. 529.

In Gardner v. Georgia Railroad Co., 117 Ga. 522, the Supreme Court of Georgia held that the right and method of condemnation set out in the charter of Appellant was an irrev-

ocable contract which could not be impaired. The Court there reviewed and reaffirmed the earlier cases cited above.

In the above cases the validity of the contract of exemption in this and other similar charters was upheld and recognized as being settled beyond question. On the faith of those decisions of this Court and of the Supreme Court of Georgia, several of them involving this very conract, the property of Appellant has been leased for a long term of years, and the present investors have purchased the stock of Appellant. The contention of appellee, if sustained, would sweep away half of their investment. If investors cannot rely on the repeated unanimous decisions of this Court and of the Supreme Court of Georgia, on what can they rely? And without confidence how can there be civilization?

Contentions of appellee on validity of charter conract

Appellee contends that the provision in the charter of Appellant is void and should not be enforced for the following reasons:

- That the legislature of Georgia was without authority to grant this provision of the charter in the first instance;
- 2. That the Fourteenth Amendment to the Constitution of the United States has rendered this provision void and unenforceable;
- 3. That Appellant forfeited its rights by failure to build the line north of Athens toward the Tennessee line and the line from Madison to Eatonton, which it was authorized to build;
- 4. That the charter provision does not apply to that part of the line between Madison and Atlanta.

The Georgia legislature had authority to grant the charter provision.

This Court has settled that the legislature of a state has the authority to enter into such a contract of partial exemption, "unless prohibited in terms by state constitutions." Jegerson Branch Bank v. Shelly, 1 Black 536; Humphrey v. Pegues, 16 Wall. 244. That holding is implicit in the many other decisions of this Court upholding such provisions. Those decisions are collected in an annotation in 173 A. L. R. 15, 25.

Appellee does not point out any provision of the Constitution of Georgia of 1798, then in force, which in terms prohibits such contract. There is no such provision in that Constitution.

This exact point has been settled by the Supreme Court of Georgia. In State v. Georgia Railroad & Banking Co., 54 Ga. 423, the State issued and levied an execution for taxes on the property of Appellant. Appellant filed affidavit of illegality, the remedy then provided by statute, on the grounds that the provision in the charter was an irrevocable contract preventing the taxation of the property except astenere provided, which the State could not impair under the Constitution of the United States. The Supreme Court of Georgia held:

"By the original charter of the Georgia Railroad and Banking Company, it was, in terms, provided that 'the stock of said company and its branches, shall be exempt from taxation for seven years from the completion of said railroads, or any one of them, and after that, shall be subject to a tax of not exceeding one-half of one per cent. per annum on the net proceeds of their investments:"

"HELD, that under the settled rules of construction, it was competent for the legislature to grant this exemption, and forming, as it does, a portion of the contract of incorporation, any repeal of it by the legislature, without the consent of the corporation, is in violation of article I, Section 10, paragraph I of the Constitution of the United States prohibiting any state from passing any law impairing the obligation of contracts."

State v. Georgia Railroad & Banking Co., 54 Ga. 423. In the later case of Goldsmith v. Georgia Railroad Co., 62 Ga. 485, the Court said:

"It seems to have been the purpose of this court to hold in 54 Ga. 423, that except as to stock issued under the amendment of 1868 authorizing the Clayton branch, the limit put by the charter of the Georgia Railroad and Banking Company upon the taxing power, extends to all the capital stock of the corporation as a railroad company, and is irrepealable. These questions were fairly involved in that case, and the adjudication of them there announced ought to be accepted as final."

Appellee centends that the decision of the Supreme Court of Georgia in State v. Georgia:Railroad & Banking Co., 54 Ga. 423, was obiter dicta and should be ignored. The ruling quoted above was the only point decided by the Supreme Court of Georgia. It is impossible for the only point decided by the Court to be obiter dicta. Moreover, under Georgia practice the plaintiff in fi. fa. was not required to file any traverse to an affidavit of illegality unless he wished to raise issues of fact, as distinguished from issues of law, and even in case of issues of fact the traverse was waived if the parties went to trial without traverse. Georgia Code of 1933, Sec. 39-1006; McLeod v. Bird, 14 Ga. App. 77.

Even if the Supreme Court of Georgia could have decided the 54th Georgia on the technical grounds, it did not do so but decided on the merits. A decision of a court is not obiter dicta because there is another technical ground on which the court could have, but did not, decided the case. *Dooley v. Gates*, 194 Ga. 787, 792.

The Fourteenth Amendment to the Constitution of the United States did not void this provision.

The contention of Appellee that the Fourteenth Amendment to the Constitution of the United States voided this provision, if sustained, would require this Court to overrule literally scores of decisions upholding and enforcing such provisions since the Fourteenth Amendment was adopted. The cases are collected in 173 A. L. R. 15, 25. This contention is so clearly without merit that we will not labor the point.

Appellant did not forfeit its charter rights by failure to build a line north of Athens or a line from Madison to Easenton.

Appellee contends that by failure to build a line north of Athens toward the Tennessee line and a line from Madison, Georgia, to Eatonton, Georgia, as authorized in the charter as amended, Appellant forfeited the contract of exemption as to the lines actually built in accordance with the charter.

Appellee has cited no case, and we can find none, holding that failure of a railroad to build all of the lines authorized by its charter works a forfeiture of its contractual rights in regard to the lines actually built. If such were the law, practically every corporation would be subject to having its charter rights forfeited, for it is common knowledge that charters almost always contain more powers than are ever exercised by the corporation. The nearest case we have found is *Illinois Trust Co. v. Doud*, 105 F. 123 (C. C. A. 8). In that case the charter granted the right to build an electric system and a gas system. The argument was made that by failing to construct and operate a gas system the corporation would forfeit its right to operate its electric system. The court summarily rejected the contention.

Moreover, it is settled that the rights set out in a corporate charter can be forfeited for non-user or misuser only in a direct proceeding brought by the State against the corporation for that purpose. Young and Calhoun v. Harrison & Harrison, 6 Ga. 130; City of Atlanta v. Gate City Gas Light Co., 71 Ga. 106; The Union Branch Railroad Co. v. East Tennessee & Georgia Railroad Co., 14 Ga. 327.

In this case not only were there no proceedings to forfeit the right set out in the charter, but the State through the legislature clearly approved the use made by the corporation of its capital. Before examining the several statutes, we must again return ourselves to the conditions existing when those statutes were passed.

This railroad was apparently the first railroad organized in Georgia (Cooper, The Story of Georgia, Vol. II, p. 339). It was the second long-line railroad in the United States, the first being the Charleston and Hamburg Railroad of South Carolina completed in 1833.

At the time these charters were granted, the routes over which it was possible and desirable to build railroads were most uncertain. The possible routes had not been surveyed and some were almost unexplored. For example, it was then thought both by the Governor and the people, that the best proposal was to join the headwaters of the Tugaloo and Chattahoochee Rivers by canal so as to connect the Atlantic and the Gulf by navigable streams. This demonstrates the complete ignorance of the mountainous terrain at the headwaters of those rivers. A state Commission and a State Engineer were necessary to dispell these misapprehensions (Cooper, Vol. II, p. 334).

Also it was then believed that a railroad could be built south from Cinc. mati to the Georgia line north of Athens. In 1835 the charter of the Georgia Railroad was amended to authorize it to extend its lines north of Athens to connect with such road, if and when built. Of course the mountains of Eastern Tennessee made it impractical to build such line, and it was never built. Instead, it was found that the only practical route was through the Chattanooga Gap.

In 1837 the State, with the proceeds of state bonds, began building a railroad from Chattanooga to Atlanta, then just a point in the wilderness. Such railroad would be useless for the development of the State unless it could be connected with the Atlantic seaboard. Obviously the best way to connect it with the Atlantic seaboard was by extending the southern branch of the Georgia Railroad from Greensboro to Atlanta instead of to Eaton.

Accordingly, by the Act of 1837, the legislature, after reciting the plans to build the State road, authorized the Georgia Railroad to employ its capital in extending its line through Greensboro to Atlanta. (app. xv.)

This proved to be an undertaking of immense difficulty, particularly in view of the financial panics which ensued. It was not until 1845 that the railroad was able to complete its line to Atlanta.

With this background let us look at the various statutes.

Sec. 15 of the original charter of 1833 expressly provides that the partial exemption from taxation should apply "after the completion of said railroads, or any one of them." This is the clearest possible expression of legislative intent that the partial exemption would apply to "any one" of the railroads completed. (app. v.)

Sec. 1 of the original charter of 1833 provides that the rail-road shall build the railroad from Augusta to Union Point, and that when this main road is completed the railroad "shall have power to construct three branches," and that, if the capital is not sufficient to build all three, then "the branch shall be first completed which the stockholders may by vote designate." (app. i.)

Sec. 15 giving this railroad exclusive franchise for 36 years, provides as a condition that "the work from, or between Augusta, and either [not both] of the places hereinbefore mentioned be commenced within two years and completed in six years." (app. v.)

Therefore, even as to the exclusive franchise, the charter required that only one, and not both, of the branches be completed.

Sec. 24 provides that the stockholders might divide the railroad from Augusta to Union Point, and the several branches, into separate corporations, and that none of such corporations would be responsible for the acts or omissions, of the others. This is the clearest possible expression of intent that the power to build the several branches was severable, and that the fallures of one would not impair the rights of the others. (app. viii.)

Sec. 2 of the Act of 1835 amending the charter (Ga. Laws 1835, p. 180), provides that one-half of the capital might be used for banking purposes "until the completion of the road to Athens, and one of the Southern branches through Greenshoro, to be designated by the vote of the stockholders; at which time any capital stock unemployed may be used for banking purposes." (app. xi.)

The right to use all capital for banking after the Athens branch and one branch through Greensboro were completed demonstrates the legislative intent that such would be complete compliance with the charter. The right then to use all remaining capital for banking negatives the duty to use such capital for building further railroads.

The Athens branch and one southern branch through Greensboro was built in complete compliance with the charter.

Moreover, Sec. 11 provides that the only penalty for failure to build even one southern branch would be forfeiture of the right to use part of the capital for banking. If the legislature had intended additional penalty of forfeiture of tax exemption, it certainly would have said so. (app. xiv.)

The Act of 1837 recites the plans to build the State road from Atlanta to the Chattahoochee River and authorizes the Georgia Railroad to use its capital to extend the southern branch from Greensboro to Atlanta to connect with the State road (Ga. Laws 1837, p. 212; app. xv.)

The legislature certainly knew that the railroad had not then built a line to Eatonton or north of Athens. It also knew that the building of the road to Atlanta would tax the capital of the railroad to the utmost. It obviously considered the building of the southern branch to Atlanta far more important than building such branch to Eatonton.

By the Act of December 11, 1858, the legislature authorized an increase of capital to build a line to Eatonton and provided that such increased capital should be subject to tax at the usual rate, but that the Act should "under no circumstances be construed as to authorize any increase of rate of taxation upon any other stock or property connected with said company other than the additional stock allowed by this Act." (Ga. Laws 1858, p. 66; app. xvii.)

Finally, by the Act approved December 7, 1859, and the Act approved December 19, 1859 (Georgia Laws 1859, p. 314, 315), the legislature withdrew from this railroad the right to build the Eatonton branch and conferred the exclusive right on the Eatonton and Madison Railroad. The charter of the latter company provided that it would have all the privileges and immunities of the Central Railroad & Banking Co. One of such privileges was that no other line could be built within twenty miles (Georgia Laws 1833, p. 246). This clearly withdrew any right of The Georgia Railroad & Banking Company to build a branch to Eatonton.

In regard to the line north of Athens, the Act of 1835, which authorized the building of the line north of Athens expressly provided:

"Provided, however, that the continuation of said road beyond Athens, so as to connect with the Cincinnati road, shall be steadily prosecuted to soon as the company shall have satisfactory evidence that such connection can be formed." (app. xk.)

The preamble of that Act recites that it was contemplated that the people of Cincinnati would build a railroad south from Cincinnati to the Tennessee Georgia line north of Athens. The Georgia Railroad was authorized to extend its line north of Athens to connect with this line when it was apparent that the connections could be formed.

It is a fact of history, of which this Court will take judicial notice, that the Cincinnati line was never built south from Encinnati toward the Georgia line north of Athens, because of the mountainous terrain, so that the circumstances under which the Georgia Railroad was authorized to build a line

north of Athens—the feasibility of connecting with the Cin-

If the matter were otherwise in doubt, the failure of the State or anyone connected with the State to raise any objection to the failure of the railroad to build such lines for over a hundred years during which every person having any knowledge of the circumstances has died in the records have been lost or destroyed, would bar the raising of the contention at this late date. It is significant, for example that General Toombs who was in the center of public affairs during this period and who was counsel for the State in the 54th Georgia and in the 62nd Georgia, did not contend that the railroad had not fully performed its obligations under its charter. He knew that the railroad had done precisely what the legislature desired it to do in using its capital to extend its southern branch to Atlanta to connect with the State road.

Counsel for the amiciae curiae cites and relies upon State v. Morgan, 28 La. 49. At first glance this case may appear to be pertinent. However, in that case the exemption was for a limited period of ten years after the completion of the railroad. The railroad was never completed. Yet it claimed the exemption many years after the expiration of the ten years from the time when the railroad should have been completed. The railroad in that case was trying to extend an exemption for a limited period of ten years to a perpetual exemption by the simple expedient of never completing the railroad. Moreover, the case was actually decided on the grounds that the exemption had been lost by sale at foreclosure. See Morgan v. La., 93 U. S. 217.

Atlanta Branch is covered by the charter provision.

Appellee contends that, in any event, the Atlanta branch, between Madison and Atlanta, is not subject to the special provision as to taxation.

The Act approved December 25, 1837 (App. xv) expressly provides that Appellant "shall have all the powers and privi-

leges, rights and immunities in the construction of said branch from Madison, as aforesaid, to the said state railroad, as arecontained in the several acts heretofore passed, and now in force, constituting eth charter of the Georgia Railroad and Banking Company, as fully and to the same extent as if said continuation had originally been part of the Georgia Railroad."

Moreover, the original charter provided that the "capital" of Appellant should be subject to tax only as provided in the charter. The courts have held that this meant the property in which the original capital was lawfully invested. Certainly the original capital was lawfully invested in the Atlanta branch and therefore is subject to the special provisions for tax to the same extent as other property in which the capital was lawfully invested.

This question has been decided against Appellee both Ly the Supreme Court of Georgia and by this Court. In State of Georgia v. Georgia Railroad & Banking Co., 54 Ga. 423, the lower court specifically considered and decided what property of the railroad was exempt and held that all of the property, except that acquired with the proceeds of the sale of 440 shares of new stock issued after 1863, was exempt. That decision was affirmed by the Supreme Court.

And in Wright v. Georgia Railroud & Banking Co., 216 U.S. 420, the Comptroller General, by his counsel the Attorney General, specifically asked the court to consider and decide what property was subject to the special tax provision. The Circuit Court held, by specific description, that the Atlanta branch was subject to that provision. This Court also considered what property was subject to that provision and held that the Washington branch, which had been acquired in a subsequent merger, was not exempt but affirmed the decree as to the Atlanta branch.

And in Wright v. L. & N. Railroad, 236 U. S. 687, this Court specifically dealt at some length with the Atlanta terminals, which of course were part of the Atlanta branch, and specifically held that the parts of the Atlanta terminal which were

built by Appellant and leased to the lessees were still exempt under the provision of the charter of Appellant.

There is no plain remedy in the courts of Georgia.

The decision of the Supreme Court of Georgia in the proceedings brought by Appellant under the mandate of this Court, entered in reliance on the assurance of the Attorney General that there was a plain remedy by appeal to the courts of Georgia, should by at rest the contention that there is such plain remedy in the courts of Georgia as will deprive the Federal Court of jurisdiction.

Appellant now has tried and been denied three remedies in the courts of Georgia:

- (1) By appeal from the assessment of the Commissiontr to the Superior Court of Georgia, Georgia Railroad & Banking Co. v. Redwine, 66 S. E. (2d) 234, entered June 13, 1951, motion for rehearing denied July 24, 1951.
- ³ (2) By suit for declaratory judgment in the Superior Court of Georgia, Musgrove v. Georgia Railroad & Banking Co., 204 Go. 139, appeal dismissed 335 U. S. 900.
- (3) By suit to enjoin the State Revenue Commissioner in the State Court, Musgrove v. Georgia Railroad & Banking Co., supra.

The Supreme Court of Georgia has expressly declined to express an opinion on what remedy, if any, is available to Appellant in the courts of Georgia, although requested to do so. Musgrove v. Georgia Railroad & Bunking Co., 204 Ga. 139, 159.

Three Justices of the Supreme Court of Georgia have said:

". ". Any other construction [than that the remedy by appeal exists] leaves uncertain and indefinite how a railroad company, or similar body, can have its tax liability adjudicated in the courts.

"... From a study of the provisions of Title 92 of our Code, we are constrained to the view that there is no part of our law more perplexing and confusing than the Code provisions relating to procedures involved in the administration of those laws. There exists much confusion as to the matter of affidavit of illegality, and other procedure for a taxpayer of the kind here involved to raise the issue of taxability. The history of this litigation demonstrates that confusion." Georgia Railroad & Banking Co. v. Redwine, 66 S. E. (2d) 234, 241.

Nothing has been said to the contrary by any of the other Justices.

Appellee has admitted that, since the Supreme Court of Georgia has determined that Appellant does not have the right of appeal, there is no other remedy in the courts of Georgia. In his motion for rehearing to the Supreme Court of Georgia (par. 7, p. 3) he said:

"In deciding sua sponte that the Act of 1943 supra took away the only available method open to the Railroad to review judicially the question to its taxability ad valorem. . ."

And in his brief in support of his motion for rehearing he said (p. 14):

"The construction placed upon the Act of 1943 takes away from the Railroad the only remaining method for judicial determination of questions of taxability." (See p. 13, supra, in which the statements are quoted more at length.)

In his brief appellee lists four remedies in the courts of Georgia which he contends are "plain, speedy and efficient."

These are:

- (1) By appeal from the assessment to the Superior Court;
- (2) By payment of the tax and suit in the Superior Court;
- (3) By suit to enjoin in the Superior Court of Fulton County, Georgia; and
- (4) By affidavit of illegality.

(1) No right of appeal.

The decision of the Supreme Court of Georgia in Georgia Railroad & Banking Co. v. Redwine, 66 S. E. (2d) 234 lays at rest the contention that there is an adequate remedy by appeal. The Court held that plainly there was no such remedy.

(2) No adequate remedy by payment and suit to recover.

The Act of 1938 (App. xxviii) does give taxpayers right to sue to recover any state tax erroneously or illegally paid to the State Revenue Commissioner.

However, only a relatively small part of this tax would go to the State of Georgia. By far the greater part would be payable to the local county tax collectors. There is no provision under the Georgia law for recovering taxes paid to a local county tax collector.

(3) No right to enjoin in the Superior Court of Fulton County.

The Act of 1938 (App. xxix) expressly provides:

"The Commissioner's assessment shall not be reviewed except by the procedure hereinafter provided; no trial court shall have jurisdiction of proceedings to question such assessments except as in this Act provided."

The courts of Georgia have held that that provision means what it says. Forrester v. Pullman Co., 192 Ga. 221. There is no provision for suit for injunction in the 1938 Act.

The cases cited by appellee were all cases that arose before the Act of 1938, withdrawing the right of injunction.

In Musgrove v. Georgia Railroad & Banking Co., 204 Ga. 139, Appellant did pray for injunction, and the Supreme Court of Georgia held that such suit could not be maintained.

(4) There is no remedy by affidavit of illegality.

It should be plain from the recent proceedings that there

is no plain remedy by affidavit of illegality. In response to the question of this Court as to what the remedy of Appellant was, counsel for Appellee stated that the remedy was by appeal to the Superior Court. Obviously he considered that remedy the plainest. Since the remedy which appeared plainest to counsel for appellee has now been held plainly not to exist, it is not likely that his third choice would be any plainer.

As pointed out above (p. 40), if his motion for rehearing to the Supreme Court of Georgia, appellee admitted, and in fact insisted, that neither the remedy of affidavit of illegality nor any other remedy would be available to Appellant.

Three of the Justices of the Supreme Court of Georgia said:

"There exists much confusion as to the matter of affidavit of illegality." Georgia Railroad & Banking Co. v. Redwine,

66 S. E. (2d) 234, 241.

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An examination of the statutes of Georgia certainly confirm that statement.

The Act of 1938, quoted above on p. 41 and in the Appendix at p. xxix, clearly withdrew the right of affidavit of illegality, if any existed at that time.

It is true that the Act of 1943 did-provide:

"Provided, however, that nothing herein contained, and no provision of this Act shall be construed to deprive a tax-payer against whom an execution for taxes has been issued under an assessment of the State Revenue Commissioner of the right to resist enforcement of the same by affidavit of illegality." (App. xxxii)

That Act did not, however, purport to create any right of affidavit of illegality. It merely said that it would not be construed as depriving the taxpayer of any such right that might then exist. At the time that Act was passed no right of affidavit of illegality existed in the situation of Appellant. Such right had probably been withdrawn by the Act of 1918 (App. xxvii) and certainly had been repealed by the Act of 1938 (App. xxix).

Moreover, there was never an adequate remedy of affidavit of illegality available to Appellant in the circumstances of this case. The two statutes cited by appellee as granting that right are the Act of 1931, codified in Sec. 92-7301 of the Code of 1933, and the Act of 1874, codified in Sec. 92-2602, 92-2603 and 92-2604.

While the Act of 1931 did provide for an affidavit of illegality to executions issued by the State Revenue Commissioner created by the Act, Sec. 82 of that Act further provided (Georgia Laws 1931, p. 34):

"Section 82. All powers and functions heretofore imposed by law on the Comptroller General . . . are hereby imposed and retained."

The ad valorem taxation of railroads was a function prevously imposed on the Comptroller General. Sec. 82 therefore excepted those functions from the matters transferred to the State Revenue Commissioner. The officials of the State of Georgia have so construed that Act, and have construed Sec. 92-7301 as not applying to executions for ad valorem taxes against railroads, as will be seen from the annotator's note under that section in the Annotated Code.

The Act of 1874, codified in Code Sec. 92-2604, expressly provided that railroads might file an affidavit of illegality only "after making the returns required by Section 92-2602 and after paying the tax levied on such corporation." (App. xx) The Supreme Court of Georgia has held that compliance with that condition, within the time provided by law, is a condition precedent to the right of affidavit of illegality, and that failure to comply will result in dismissal. Goldsmith v. Georgia Railroad Co., 62 Ga. 485. The Supreme Court of Georgia therefore held that the remedy of affidavit of illegality with not adequate and that suit for injunction would lie under the law as it then existed because of the failure of an adequate remedy at law.

"It (the Railroad) is remedyless now under the mode provided by the Act of 1874. It has no remedy at law as

the case now stands. It cannot make now the returns required to have been made in 1876 and 1877 because the time is passed; and if it has any remedy it is in equity." Wright v. Southwestern Railroad Co., 64 Ga. 783, 793.

Moreover, this remedy, if available, would mean a vast multiplicity of suits. The law provided that the Commissioner shall issue separate executions for the tax due to the State and for the tax due to each county and city, and that affidavit of illegality to such executions shall be returned to the Superior Court of the county in which the tax is claimed (App. xxiv). This Railroad runs through 14 counties and 16 municipalities. Taxes for twelve years are now claimed. To resist all these taxes by affidavit of illegality would require 372 proceedings in 14 different courts.

. Any procedure involving such multiplicity of actions certainly is not adequate or "efficient". Graves v. Texas Co., 298 U. S. 393; Union Pacific Railroad v. Weld County, 247 U. S. 282; Risty v. Chicago R. I. P. Railroad, 270 U. S. 378.

Moreover, as pointed out at the outset, any right of affidavit of illegality which existed prior to 1938 was clearly repealed by the Act of 1938 and has not been reenacted.

Respectfully submitted,

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APPENDIX

STATUTES OF GEORGIA CITED

- 1. Charter of Georgia Railroad & Banking Co., and Amendments Thereto.
- (1) Act Approved December 21, 1833, Georgia Laws of 1833, p. 256.
- AN ACT—To Incorporate the Georgia Railroad Company, with powers to construct a Rail or Turnpike Road from the City of Augusta, with Branches Extending to the Towns of Eatonton, Madison, in Morgan County, and Athens; to be carried beyond those places, at the discretion of said Company; to punish those who may wilfully injure the same; to confer all corporate powers necessary to effect said object; and to repeal an Act entitled "An Act to authorize the formation of a Company for constructing a Railroad or Turnpike from the City of Augusta to Eatonton, and thense westward to the Chattahoochee River, with Branches thereto, and to punish those who may injure the same," passed the 27th December, 1831.

SEC. 1. Be it enacted, etc., That the Company provided for fin this Act, and hereinafter more especially incorporated and authorized, shall and may direct and confine their first efforts and enterprise to the formation and completion of a Railroad communication between the City of Augusta and some point in the interior of the State, to be agreed upon by the stockholders, which Road shall be called the Union Railroad; and the same being completed, the Company shall have power to construct three Branch Railroads, beginning at the point agreed upon as the termination of the Union Railroad, or such point for the Middle Road as the stockholders may select; one running to Athens—one to Eatonton—and the third to Madison,

in Morgan County; which Branches shall be erected simultaneously; Provided, The amount of stock subscribed will warrant the completion of all at the same time; and if the stock subscribed will not warrant the completion of all of said Branches at one and the same time, then that Branch shall be first completed which the stockholders may by vote designate. The Company shall have the further power to continue the Athens Branch towards any point which may be agreed upon, on the Tennessee River—all of which shall be done at such time and in such manner as the stockholders may direct.

SEC. 2. The Company shall have the exclusive privilege of constructing Railroads from any point in this State within twenty miles of the Road herein designated as the Union Road and its Branches, leading to Eatonton, Athens and Madison, continuously to the City of Augusta, for and during the term of thirty-six years.

SEC. 3. The stock of the Company authorized and incorporated by this Act shall consist of fifteen thousand shares, of one hundred dollars each share, and the said Company to be formed on that capital; but the said Company shall be at liberty to enlarge their capital, as, in the progress of their undertaking, they may find necessary; and that, either by additional assessments on the original shares, not to exceed in the whole the sum of twenty dollars in addition to each original share, or by opening books for enlarging their capital by new subscriptions, in shares of not more than one hundred dollars, so as to make their capital adequate to the works they may undertake, and also to prescribe the terms and conditions of the new subscriptions. And it shall be lawful for the company, from time to time, to invest so much, or such parts of their capital, or of their profits, as may not be required for immediate dise, and until it may be so required, in public stock of the United States, or of this State, or of any incorporated Bank, or lend out the same at interest on good security, and draw and apply the dividends, and when and as they shall see fit, sell and transfer any parts or portions thereof: Provided, That nothing herein contained shall be so construed as to authorize said Company

to issue bills of credit, or to loan out any moneys at a greater rate of interest than eight per cent.

SEC. 9. The aforesaid Company, to be organized as aforesaid, shall be called "The Georgia Railroad Company," and shall have perpetual succession of members, may make and have a common seal, and break or alter it at pleasure; and by their corporate name aforesaid may sue and be sued, answer and be answered unto, in all courts of law and equity, or judicial tribunals of this State; and shall, at all times, be capable of making and establishing, altering and revoking all such regulations, rules and By-Laws for the government of the Company and its Directors, as they may find necessary and proper for the effecting of the ends and purposes intended by the Association and contemplated in this Act: Provided, Such rules and regulations, and By-Laws, shall not be repugnant to the Laws and Constitution of this State.

SEC. 10. The said Georgia Railroad Company shalf have power and capacity to purchase, and have and hold, in fee simple, or for years, to them and their successors, any lands, tenements or hereditaments that they may find necessary for the site, on and along which, to locate, run and establish the aforesaid Railroad and Railroads, or any Branches thereof; or to vary or alter the plan or plans, and of such breadth and dimensions through the whole course of the Road and Roads, as they may see fit; and also, in like manner, to purchase any lands contiguous, or in the vicinity of the Railroad and Railroads, hereby authorized, that they may find necessary for the procuring, and from time to time, readily obtaining all necessary or proper materials, of what kind soever, for the constructing, repairing, and adequately guarding and sustaining the said Railroad or Railroads; and in like manner to purchase all rights of way on land, and all necessary privileges in waters or water courses, that may lie on or across the route which the said Railroad or Railways may pass; and also all lands contiguous thereto, that may be found necessary for the erecting of toll houses, store houses, workshops, barns, stables, residences and accommodations for servants or agents or mechanics, and for the stationing and sustaining all animals of labor. And the said Company shall have power, if need be, to conduct the Railroad across any public road, and, by suitable bridges over and across all or any rivers, creeks, water or water courses, that may be in the route; or if they should deem it more convenient and suitable, may pass carriages, using the Roads, by convenient boats, across the same: Provided, That the said Company shall so construct their Railroad across all public roads as not to obstruct or injure the same.

SEC. 12. The said Georgia Railroad Company shall, at all times, have the exclusive right of transportation or conveyance of persons, merchandize, and produce, over the Railroad and Railroads to be by them constructed, while they see fit to exercise the exclusive right: Provided, That the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds, on heavy articles, and ten cents per cubic foot, on articles of measurement, for every one hundred miles; and five cents per mile for every passenger: Provided, always, That the said Company may, when they see fit, rent or farm out all or any part of their exclusive right of transportation or conveyance of persons on the Railroad or Railroads, with the privilege to any individual or individuals, or other company, and for such term as may be agreed upon, subject to the rates above mentioned. And the said Company, in the exercise of their right of carriage or transportation of persons or property, or the persons so taking from the Company the right of transportation or conveyance, shall, so far as they act on the same, be regarded as common carriers. And it shall be lawful for the said Company to use or employ any section of their intended Railroad, subject to the rates before mentioned, before the whole shall be completed, and in any part thereof, which may afford accommodation for the conveyance of persons, merchandize or produce. And the said Company shall have power to take, at the store houses they may establish on or annexed to their Railroad, all goods, wares, merchandize and produce intended for transportation or conveyance; prescribe the rules of priority; and charge such just and reasonable terms and compensation for storage and labor as they may by rules establish (which they shall cause to be published), or as may be fixed by agreement with the owners; which compensation shall and may be distinct from the aforesaid rates of transportation.

SEC. 14. Whenever the Company aforesaid shall see fit to farm out as aforesaid, to any person or persons, or body corporate, any part of their exclusive right of conveyance and transportation, or shall deem it expedient to open the said road, or any part thereof, to public use, they shall and may adopt and enforce all necessary rules and regulations, and have power to prescribe the construction and size or burthen of all carriages and vehicles, and the materials of which such shall be made, and the locomotive power shall be used with them.

SEC. 15. The exclusive right to make, keep up and use the Railroads and transportations, authorized by this Act, shall be for and during the term of thirty-six years, to be computed. from the time when the said Road from Augusta to either of the points hereinbefore designated, shall be completed for transportation: Provided, That the subscription of stock or shares of said Company to the amount of at least five thousand shares as aforesaid, becalled up within six months from the passing of this Act, and the work from, or between Augusta, and either of the places hereinbefore first mentioned, be commenced within two years and be completed within six years after the five thousand shares shall be subscribed. And after said term of thirty-six years shall have elapsed, though the Legislature may authorize the construction of other Railroads, for the trade and intercourse contemplated herein: Nevertheless, The Georgia Railroad Company shall remain and be incorporate, and vested with all the estate, powers and privileges as to their own works herein granted and secured, except the exclusive right to make, keep up, and use Railroads over and through such parts of the country, that shall so have expired

by the foregoing limitations; but the Legislature may renew and extend that exclusive right, upon such terms as may be prescribed by law, and be accepted by the said incorporated Company. The stock of the said Company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said Railroads, or any one of them; and after that, shall be subject to a tax not exceeding one-half per cent. per annum on the net proceeds of their investments.

SEC. 18. Every person who shall be a subscriber to or holder of stock in the said Company, shall pay to the Company the instalment of fifteen dollars on each and every share, in such periods of not less than six months, as shall be prescribed and called for by the Directors, after which the Directors may call for the further moiety of each share, in payments not exceeding fifteen dollars per share, in periods of not less than six months, of which periods of payment by instalment on the shares, and the sums required, the Board of Directors shall cause public notice to be given for at least four weeks previously to the day of payment, by advertising the same in one or more of the gazettes of Milledgeville and Augusta: And failure to pay up any one of the instalments so called for as aforesaid shall induce a forfeiture of the share and shares on which default shall be so made, and all past payments thereon, and the same shall vest in and belong to the Company, and may be appropriated as they shall see fit. It shall be the duty of the Company, as soon as may be after they are organized, or of the Board of Directors, to issue scrip to each subscriber for the shares he holds, and deliver the same at the time of the second payment; on which, if convenient and practicable, receipts for the instalments paid, and that may successively be paid, may be endorsed, and the scrip issued may be made assignable and transferable in person or by attorney, at the office and on the books of the Company; and the said corporation shall and may, in and by their By-Laws, rules and regulations, prescribe the mode of issuing the evidences of shares of stock and the terms

and conditions, as also the times and manner in which shares in the Company may be transferred.

SEC. 19. Whensoever the said Company shall find occasion to increase their capital by additional assessments on the original shares, as before mentioned, in the third section of this act, within the limits therein mentioned, the said further sum on each share shall not be called for in less than two instalments at similar periods, and like notices as are mentioned and provided in the immediately preceding section; and failure to pay up such additional assessments shall in like manner, as therein provided, induce a forfeiture of the Company of the share or shares of stock on which default should so be made.

SEC. 20. The President and Directors shall be styled "The Directors of the Corporation," and shall make all contracts and agreements in behalf thereof, and have power to call for all instalments, declare all dividends of profits, and to do and perform all other acts and deeds which, by the By Laws of the corporation, they may be empowered or required to do and perform; and the acts of the Direction, or their contracts, authenticated by the signatures of the President and Secretary, shall be binding on the corporation without seal. Regular minutes shall be kept of all meetings of the Direction, and of the acts there done; and the Direction shall not exceed in their contracts the amount of the capital of the corporation; and in case they shall do so, the President and Directors who are present at the meeting at which such contract or contracts so exceeding the capital shall be made, shall be jointly and severally liable for the amount of the excess, both to the contractor or contractors and to the corporation: Provided, That any one may discharge himself from such liability by voting against such contract or contracts and causing such vote to be recorded in the minutes of the Direction, and giving such notice thereof to the next general meeting of the stockholders.

SEC. 22. If the Company, instead of constructing the Railroads herein specified, should deem it preferable to construct common roads, and use steam carriages thereon, they shall have power to do so under the same regulations, and with the same privileges in all respects as are herein prescribed in relation to railroads.

SEC. 23. The Act entitled "An Act to authorize the formation of a Company for constructing a Railroad or Turnpike from the City of Augusta to Eatonton, and thence westward to the Chattahoochee River, with Branches thereto, and to punish those who may injure the same," passed the 27th December, 1831, is hereby repealed in every clause and section thereof; and this Act of incorporation shall be deemed and taken to be a Public Act, and shall be judicially taken notice of as such without special pleading.

SEC. 24. Whensoever a number of the stockholders in interest amounting to three thousand shares; shall unite for one furtherance, construction and completion of either of said Branches of said Road, they shall have power to terminate said Union Road, and may, at such time and place as they may choose and designate, determine for themselves the point or place of diverging with such Branch of said Road as they may then and there point out and ascertain to be identified with their interest as stockohlders: Provided, The said stockholders so electing shall have given to the said Union Company, their agents or attorney, ten days previous notice of such their choice, of their respective names and their respective disunion, of stock, and of the point or place of their intended disunion. That said stockholders so electing and determining as aforesaid, shall and may then and there be and exist as a separate body corporate, and shall then and there, and thenceforward, have, use, and exercise all the rights, privileges, immunities and enjoyments hereby given, granted and secured to said Union Company, to attach, be held, used and exercised by said stockholders so electing as aforesaid, of, for, on account of, and to the particular Road to which they may then and there direct and apply themselves. That their powers as a corporate body shall be similar, and their rights, privileges and immunities, in regard to said Road, so diverging, shall be the

same, and subject to the same restrictions, as herein and hereby provided, imposed and granted to, upon and for the said Union Company. They shall not be called on by said Union Company, from and after the day of their said election and determining said point of diverging, for any other or further payment on stock, but may proceed as a distinct Company to construct a Branch of said Road to and through the respective points Eatonton, Greensborough and Madison, or Athens, respeco tively, according to circumstances, as they may choose—and . said stockholders so electing and determining as aforesaid, shall be known, according to the Branch to which they shall respectively attach themselves, by the corporate name and style of the Eatonton Railroad, the Greensborough and Madison Railroad, or the Athens Railroad. And said Branch Companies. so named, shall and may apply the residue of their stock, unpaid and unapplied at said time of diverging, to the separate and sole use and construction of the Branch to which each may be attached, and shall and may have, use and enjoy, all the rents, issues and profits of said Branch, to which they may be attached, to the sole use, benefit and behoof of themselves, their heirs and assigns, for the time heretofore limited to said Union Company, and according to the provisions of this Act. They shall in no way be liable to each other as separate Companies, for the expenses or repairs of their respective Roads, nor in any way responsible for each other's acts, from and after the time and place of disunion or diverging, designated aforesaid, so long as they may remain and exist as separate Companies. The stockholders in the Union Road, to the point of diverging. shall, nevertheless, exist as one corporate body, and be liable as such that far, and receive the benefits of said Union Road to said point, according to the provisions hereinbefore contained: Provided, That nothing herein contained shall prevent said Branch Companies from uniting their interests and efforts, as circumstances mutually moving them may suggest.

(2) Act-approved December 18, 1835, Georgia Laws of 1835, p. 180.

WHEREAS, The people of the West have in contemplation to make a communication between the City of Cincinnati and the

Southern Atlantic coast by means of a Railroad; and whereas the best route for said communication is believed to be through the State of Georgia; and whereas, the building of the Georgia Railroad is now in progress, and will be an important link in the line of said communication.

SEC. v. Be it, therefore, enacted, &c., That the stockholders of the Georgia Railroad Company, and such other persons as shall take stock under this Act, and their successors and assigns, shall hereafter be a body corporate by the name and style of the Georgia Railroad and Banking Company, and by the said corporate name shall be, and are hereby made able and capable in law, to have, purchase, receive, possess, enjoy, and retain, to them and their successors, lands, rents, tenements, hereditaments, goods, chattels, and effects, of whatsoever kind, nature or quality the same may be, sufficient for the construction of banking houses, and the erection of the Railroad only, and the same to sell, grant, demise, alien, or dispose of; to sue and be sued, plead and be impleaded, answer and be ganswered unto, defend and be defended in courts of record, and also to make and have a common seal, and the same to break, alter or renew, at their pleasure, and also, by and through the Board of Directors, to ordain, establish, and put in execution, such by-laws, rules and regulations as shall be necessary and convenient for the governing of said corporation, as to them may or shall appertain; Provided, That such by-laws, rules and regulations shall not be contrary to the Laws and Constitution of this State or of the United States, nor to the rules, regulations, restrictions and limitations prescribed in this Act.

SEC. 2. Be it further enacted, That the stock of said Company shall consist of two millions of dollars, one-fourth of which, applied to banking purposes, shall be gold or silver coin, in shares of one hundred dollars each; of which capital one-half may be used for banking purposes, and not more, until the completion of the Road to Athens, and one of the southern Branches through Greensborough, to be designated by a vote of the

stockholders; at which time any capital stock unemployed may be used for banking purposes; Provided, however, That the continuation of said Road beyond Athens, so as to connect with the Cincinnati Road, shall be steadily prosecut d so soon as the Company shall have satisfactory evidence that the said connection can be formed.

SEC. 3. And be it further enacted, That the Directors of the Georgia Rainroad Company, for the time being, shall have power at their discretion to open books of subscription at such times and places as they may think proper, giving such notice in one or more of the public gazettes of this State as they may deem necessary for additional subscriptions to the capital stock of said Georgia Railroad and Banking Company; on which subscriptions there shall be required to be paid, at the time of subscribing, the amount per share that may be prescribed by the Directors aforesaid; and that the President and Directors of the Georgia Railroad Company, for the time being, shall be the President and Directors of the new corporation until the time fixed for the annual election next thereafter.

SEC. 4. And be it further enacted, That the Board of Directors of the said corporation shall have power at its discretion to establish agencies for carrying on said work, and may have branches of its banking powers, not exceeding three, and at such times as to them may seem expedient: Provided, That no branch for banking purposes shall be established or located in any incorporated town without the consent of the corporate authorities thereof first obtained for that purpose.

SEC. 5. And be it further enacted, That the Directors aforesaid shall have power to open books for the subscription of stock, from time to time, until the capital stock shall be filled up; and that all further instalments on the stock herein provided to be subscribed for, shall be called for and paid in according to the provisions of the Act of which this is an amendment, and shall be under the same liabilities in case of failure to pay.

SEC. 6. And be it further enacted, That the bills obligatory and of credit, notes, and other contracts whatsoever, in behalf of the said corporation, shall be binding and obligatory on the said corporation: Provided, The same be signed by the President and countersigned by the Cashier of the said Company; and the funds of the corporation shall, in no case, be held liable for any contract or engagement whatsoever, unless the same shall be so signed and countersigned, as aforesaid, except for such checks or bills of exchange as shall be made or endorsed by the Cashier or President thereof, in the course of the business of said Company, and except for such contracts as shall be made under the authority of the Board for work done on the Road; and the funds of the corporation shall, at all times, be subject to the inspection of the Board of Directors and Stockholders, when convened, according to the provisions of this Act, and of the Act of which this is an amendment.

SEC. 7. And be it further enacted, That the said corporation shall not, at any time, suspend or refuse payments in gold or silver coin, or any of the notes, bills or obligations, and if the said corporation shall, at any time, refuse or neglect to pay, on demand, any bill, note or obligation, issued by the corporation according to the contract, promise or undertaking, therein expressed, to the person or persons entitled to receive the same, then, and in every such case, the holder of such note, bill, or obligation, shall respectively be entitled to receive and recover interest on the same, until the same shall be fully paid and satisfied, at the rate of ten per cent per annum, together with the lawful interest thereon, from the time of such demand as aforesaid.

SEC. 8. And be it further enacted, That the following rules, regulations, limitations and provisions, shall form and be the fundamental articles of the said corporation:

RULE I. The number of votes to which each stockholder shall be entitled, shall be according to the provisions of the 7th section of the Act of which this is an amendment.

- II. The Cashier and other officers of the banking department of said corporation (the President excepted), shall, before they enter upon the duties of their offices respectively, give bond for the faithful performance of their duties, with such security as may be required by the Board of Directors.
- III. The total amount of debts which the said corporation shall, at any time, owe, whether by bill, bond, note, or other contract, shall not exceed three times the amount of capital stock actually paid in, and set apart for banking purposes.
- IV. Dividends of the net profits of the stock used in banking purposes, or of so much thereof as may be prudent, shall be declared and paid half yearly, if the condition of the Company warrant it, until the Road shall yield a profit, when and in which case, that profit may also in like manner be divided; and such dividend shall, from time to time, be determined by a majority of Directors, at a meeting to be held for that purpose, and shall, in no case, exceed the amount of the net profits actually acquired by the corporation, so that the capital stock thereof shall never be impaired.
- V. The Directors shall cause to be kept fair and regular entries in a book to be provided for that purpose, of their proceedings; and on any question, when any one Director shall require it, the yeas and nays of the Directors voting shall be recorded in such book, and the minutes be at all times, on demand, produced to the stockholders, at their general meeting.
- VI. So soon as fifty per cent. of the stock already subscribed, and of the stock which may hereafter be taken in the said Company, shall have been paid in, the Company shall have the power and privilege, and not till then, of commencing banking operations, and for that purpose shall have the power to prepare and issue notes, signed by the President and countersigned by the Cashier, as in the usual course of banks in such cases: Provided, That of the sum so received, one-half shall be set apart for their said banking operations, and the other half to

the building of the Road, and so on in the like ratio as to all further instalments which may thereafter be called in.

- VII. That portion of the capital stock hereinbefore provided for, and set apart for the purpose of building the Road, shall in no wise be diverted from that object, except as provided for in the second section of this Act.
- SEC. 9. And be it further enacted, That the President and Directors of the Company shall be elected annually, as provided for in the Act to which this is an amendment; and the Board of Directors of the said corporation shall have power to appoint a Cashier and such other officers as may be necessary for the transaction of the banking business herein provided for, and to allow them reasonable compensation for their services; and shall be capable of exercising all such powers and authorities for the well governing and ordering of the affairs of said corporation as to them shall seem best calculated to promote the best interest of the Company.
- SEC. 10. And be it further enacted, That the principal office of said Company shall be located at Athens, and all elections and meetings of the stockholders shall be held at such principal office, except when otherwise ordered by the Directors on special occasions.
- SEC. 11. And be it further enacted, That the Union Railroad, as authorized by the first section of the Act to which this is an amendment, shall be completed within four years from the passage of this Act; and the Branch to Athens, and one of the southern Branches through Greensborough, which shall be designated by a vote of the stockholders, shall be completed within six years after the passage of this Act; and on failure thereof, the banking privileges hereby granted shall be thenceforth forfeited, and all banking operations shall thenceforward, in such event, be made to cease and determine.
- SEC. 12. And be it further enacted, That the banking privileges hereby granted shall be and continue for and during

the term of twenty-five years, to be computed from the time fixed by this Act for the completion of the Union Road.

SEC. 13. And be it further enacted. That the Act to which this is an amendment shall be and remain in full force and effect, in every section and clause thereof, except where it conflicts with the provisions of this Act.

SEC. 14. And be it further enacted, That all the acts done and contracts made by the Georgia Railroad Company are hereby declared to be of binding efficacy on the Georgia Railroad and Banking Company; and all the rights to property acquired by the Georgia Railroad Company, of whatsoever nature or kind the same may be, shall pass to and be vested in the Georgia Railroad and Banking Company as fully and completely as they were vested in the said Georgia Railroad Company.

SEC. 15. And be it further enacted, That the persons and property of the stockholders for the time being, of the said Georgia Railroad and Banking Company, shall be pledged and bound in proportion to the amount of shares held by each, for the ultimate redemption of the bills or notes issued by and from said Company, in the same manner as in common commercial cases or simple actions of debt.

SEC. 16. And be it further enacted by the authority aforesaid, That no exclusive privilege or right of road, extended to the corporation by the Act of which this is amendatory, shall prevent the State from granting a charter to any Company that may hereafter apply for a Railroad to run from Macon to the Tennessee State line; and from granting any charter or charters to construct any Road to cross said Road, at any point west of Eatonton, or Madison, or Athens.

(3) Act approved December 25, 1837, Georgia Laws 1837, p. 212.

WHEREAS, By an Act entitled "An Act to authorize the construction of a Railroad communication from the Tennessee

line, near the Tennessee river, to the point on the southeastern bank of the Chattahoochee river, mostly eligible for running branch roads, thence to Athens, Madison, Milledgeville, Forsyth and Columbus, and to appropriate monies therefor," encouragement is held out in the tenth section of said Act, for the construction of branch Railroads from the terminus of said State Railroad, on the Chattahoochee river, to the several towns of Athens, Madison, Milledgeville, Forsyth and Columbus:

AND WHEREAS, in pursuance of the views of said Act, the Monroe Railroad Company, and the Chattahoochee Railroad Companies have obtained the privilege, by acts of the Legislature, to connect their roads with said State Railroad;

Now, for the purpose of extending a like privilege to the Georgia Railroad and Banking Company, to continue their Road from the town of Madison, to pass through or near the town of Covington, to the said State Railroad, on the Chattahoochee river:

SEC. 1. Be it enacted, etc., That the said Georgia Railroad and Banking Company shall have the right, and they are hereby authorized and empowered to continue their Railroad from the town of Madison, in Morgan County, to pass through or near Covington, in the County of Newton, to connect with and join the Railroad, about to be constructed by the State, from the Tennessee line, near the Tennessee river, to the southeast bank of the Chattahoochee river, as contemplated by the Act recited in the foregoing preamble, and for that purpose the said Georgia Railroad and Banking Company shall have all the powers and privileges, rights and immunities in the construction of said branch from Madison, as aforesaid, to the said State Railroad, as are contained in the several acts heretofore passed, and now of force, constituting the charter of the Georgia Railroad and Banking Company, as fully as if the said continuation had been originally a part of the Georgia Railroad, and the said acts shall extend to and regulate the construction of said extended road, hereby authorized to be constructed, in the same

manner, and to the same extent, and for the same purposes and uses, as the same have been used and applied to the Georgia Railroad and its branch from the city of Augusta to the said town of Madison.

(4) Act approved December 20, 1849, Georgia Laws 1849,

SEC. 1. Be it enacted by the Senate and House of Representatives of the State of Georgia in General Assembly met, and it is hereby enacted by the authority of the same, That the Georgia Railroad and Banking Company shall be allowed to increase their capital to a sum not exceeding five million dollars, upon such terms, limitations and conditions as the stockholders thereof, in Convention, shall determine: Provided, always, that the banking capital of said Company shall not be increased beyond the amount now authorized by their charter, namely, one million of dollars.

SEC. 3. And be it further enacted, That the power heretofore granted to the Georgia Railroad and Banking Company of constructing a branch of their road to Washington, in the County of Wilkes, be and the same is hereby revived and authorized to be exercised by said Company: Provided, That the amount of the increased stock of said Company shall not be exempted from taxation, as is secured to the present stock by the latter clause of the 15th section of the charter of said Company, but shall be subject to such tax as the Legislature may hereafter impose.

(5) Act approved December 11, 1858, Georgia Laws 1858, p. 66.

SEC. 1. Be it enacted, That the Georgia Railroad and Banking Company be and they are hereby authorized and empowered to extend the Eatonton Branch of their road either from

Greensboro or Madison, or from any point between those places, to the town of Eatonton, and to increase the capital stock of said Company to an amount sufficient for that purpose, with all the powers and privileges, rights and immunities contained in the existing charter: Provided, nothing herein contained shall be construed to authorize said Company to make any increase of its banking capital: And provided also, that such additional stock as shall be allowed under this Act shall be subject to such rate of taxation as the Legislature may from time to time assess, either directly or through the Executive of. the State, such rate of taxation never to exceed that put upon the property of the people of this State, and this reserved right to tax the additional stock authorized under this Act in no case nor under any circumstances to be construed to authorize any increase of rate of taxation upon any other stock or property connected with said Company other than the additional stock allowed by this Act.

(6) Act approved October 5, 1868, Georgia Laws 1868, p. 147.

Whereas, In the original charter of said Georgia Railroad and Banking Company (then known as the Georgia Railroad Company), it is provided that said Company shall have the power to continue the Athens Branch towards any point which may be agreed upon on the Tennessee river, and by the amended charter of said Company, passed in December, 1835, it is provided that the continuation of said Road beyond Athens, so as to connect with the Cincinnati Road, shall be steadily prosecuted so soon as the Company shall have satisfactory evidence that the said connection can be formed. And whereas, reasonable hopes are now entertained that said Cincinnati Road will be finished to the town of Clayton at no distant day:

SEC. 1. Be it, therefore, enacted by the Logislature of the State of Georgia, in General Assembly met. That the Georgia Railroad and Banking Company have the power to extend their Road from or near the city of Athens to the town of Clayton, in Rabun County, and for that purpose the said Company shall

have and enjoy all the powers and privileges of the original charter and amendments.

- SEC. 2. For the purposes stated in the above section, the said Company may increase its capital to such forms and upon such terms as the Board of Directors may determine: Provided, said increase shall not exceed two million dollars.
- Laws providing for the taxation of railroads and remedies of taxpayer.
- (1) Act approved February 1, 1850, Georgia Laws 1849, p. 378.
- AN ACT—Supplementary to the General Tax Laws, and to Tax Certain Property therein mentioned which has been heretofore Exempted from Taxation.
- SEC. 1. Be it enacted by the Senate and House of Representatives of the State of Georgia, in General Assembly met, That the President of the Georgia Railroad shall, on or before the thirty-first day of December, 1850, pay into the Treasury of this State, as a tax for the year 1850, on oath, one-half of one per cent. on the next annual income of the stock of said Road and its branches, under the penalty of double tax for his refusal or neglect to do so, to be collected by execution to be issued by the Treasurer.
- SEC. 2. And be it further enacted, That the increase of capital of the Georgia Railroad and Banking Company, authorized by the Act of the present session of the General Assembly, be and the same is hereby taxed thirty-one and a quarter cents on every hundred dollars worth.
- SEC. 5. And be it further enacted, That each and every of the Presidents of the aforesaid Railroad Companies shall make like payments on the thirty-first day of December in each and every year hereafter, until this Act shall be repealed: Provided,

- Phat no banking capital employed by the Georgia Railroad and Banking Company, and the Central Railroad and Banking Company, shall, by any construction of this Act. be exempt from future taxation, at the discretion of the Legisltaure, and the tax on net profits only be on the net profits of the Railroad.
 - (2) Act approved February 28, 1874, Georgia Laws, p. 107, as amended and now codified in Code Sections 92-2602, 92-2603, and 92-2604.

"92-2602. (1032) Presidents to make returns.—The presidents of all the railroad companies, including street railroads, dummy railroads, and electric railroads in this State shall be required to return on oath, annually, to the Comptroller General, the value of the property of their respective companies, without deducting their indebtedness; each class or species of property to be separately named and valued, so far as the same may be practicable, to be taxed as other property of the people of the State; and said returns shall be made under the same regulations provided by law for the returns of efficers of other incorporated companies, which are required by law to be made to the Comptroller General: Provided, that the said railroads shall be taxable for city purposes as other property is taxed for city purposes, and any law making railroad companies taxable by counties will be applicable, to street railroad companies of every character. (Acts 1874, p. 107; 1889, p. 36.)

presidents shall pay to the Comptroller General the taxes assessed upon the property of said railroad companies; and on failure to make the returns required by the preceding section, or on failure to pay the taxes so assessed, the Comptroller General shall proceed to enforce the collection of the same in the manner provided by law for the enforcement of taxes against other incorporated companies. (Acts 1874, p. 107.)

"92-2604. (1034) Illegality to resist tax; venue.—If any railroad company affected by the preceding sections desires to resist the collection of the tax therein provided for, said company through its proper officer may, after making the

return required in section 92-2602, and after paying the tax levied on such corporation and continuing to pay the same while the question of its liability herein is undetermined, resist the collection of the tax above provided for, by filing an affidavit of illegality to the execution or other process issued by the Comptroller General, stating fully and distinctly the grounds of resistance, which shall be returnable to the superior court of Fulton County, to be there determined as other illegalities; the same to have precedence of all cases in said court as to time of hearing, and with the same right of motions for new trial and writs of error as in other cases of illegality, in which case the Comptroller General shall be represented by the Attorney General of the State. If the grounds of such illegality are not sustained, the Comptroller General shall, after crediting the process aforesaid with the amount paid, proceed to collect the residue due under the provisions aforesaid; and if, at any time during the pendency of any litigation herein provided for, the said corporation shall fail to pay the tax required to be paid as a condition of hearing, said illegality shall be dismissed, and no second affidavit of illegality shall be allowed. Said illegality may be amended as other affidavits of illegality, and shall always be accompanied by good bond and security for the payment of the tax execution issued by the Comptroller General. (Acts 1874, p. 107; 1931, pp/7. 38.)"

TOW.

(3) Act approved February 22, 1877, Georgia Laws 1877, p. 126, as amended and as now codified in Sections 92-5904, 92-6001 and 92-6002 of the Georgia Code of 1933.

"92-5964. (1050) Returns to be itemized.—When corporations, companies, persons or agencies are required by law to make returns of property, or gross receipts, or business, or income, gross, annual, net, or any other kind, or any other return, to the Comptroller General for taxation, such return shall contain an itemized statement of property, each class or species to be separately named and valued, or an itemized account of gross receipts, or business, or income as above

defined, or other matters required to be returned, and in case of net income only, an itemized account of gross receipts and expenditures, to show how the income returned is ascertained. (Acts. 1877, p. 126; 1905, p. 68)."

"92-6001. (1050). Assessment to correct returns.—The Comptroller general shall carefully scrutinize the returns made to him, and if in his judgment the property embraced therein is returned below its value, or the return is false in any particular, or in any wise contrary to law, he shall within 60 days thereafter correct the same and assess the value, from any information he can obtain. (Acta 1877, p. 126; 1905, p. 68)."

"92-6002. (1045, 1050). Arbitration of assessments to correct returns.-In all cases of assessment or correction of returns, as provided in section 92-6001, the officer or person making such returns shall receive notice and, if dissatisfied with the assessment or correction of returns, shall have the privilege, within 20 days after such notice, to refer the question of the true value or amount to arbitrators-one chosen by himself and one by the Comptroller General-who, in case of disagreement, may choose an umpire. If the two arbitrators, disagreeing, fail to select an umpire within 30 days after receiving notice of their appointment, the Governor shall appoint two arbitrators, who, with the arbitrator selected by the officer or person making the returns, shall determine the question as to the amount of value. Every arbitrator or umpire chosenhereunder shall be a citizen of Georgia. The award shall be made within 30 days from the appointment of the umpire or, in case no umpire is chosen, within 30 days from the appointment of arbitrators by the Governor; and their award shall be final. (Acts 1877, p. 126; 1878-9, b. 166; 1905, p. 68.)"...

(4) Act approved October 16, 1889, Georgia Laws 1889, p 29, now codified in Code Sections 92-2701, 92-2702, 92-3703, 92-2704, 92-2705, 92-2706.

"92-2701. (1036) Railroads to report to Comptroller General annually.—On or before the first day of March each railroad

company in this State shall make an annual return as of January first preceding to the Comptroller General, for the purposes of county taxation in each of the counties through which said road runs, in the following manner: Said return shall be under the oath of the president or other chief executive officer, and shall show the following facts as they existed on the first day of January preceding, to wit: first, the aggregate value of the whole property of said railroad company; second, the value of the real estate and track-bed of said company; third the value of the rolling stock and all other personal property of said company; fourth, the value of the company's property in each county through which it runs. (Acts 1889, p. 29; Const., Art. VII, Sec. II, Par. VI (§2-5007).)

"92-2702. (1037) Taxation by each county through which railroad passes.—Whenever the amount of the tax levy of any county through which the said railroad runs is assessed by the authority of such county, the ordinary or other authority having charge of county affairs shall certify the same and transmit the certificate to the Comptroller General; and the property of such railroad company shall be subject to taxation in each county through which the road passes, to the same extent and in the same manner that all other property is taxed, in the manner hereafter set out. (Acts 1889, p. 29.)

"92-2703. (1038) Property assessed.—Whenever such certificate is received by the Comptroller General, he shall proceed to assess the amount of each railroad company's property, in each of said counties, in the following manner: First, it shall be assessed upon the property located in each county, upon the basis of the value given by the returns. Second, the amount of tax to be assessed upon the rolling stock and other personal property is as follows: As the value of the property located in the particular county is to the value of the whole property, real and personal, of the said company, such shall be the amount of rolling stock and other personal property to be distributed for taxing purposes to such county. The value of the property located in the county and the share of the rolling

stock and personal property thus ascertained, and apportioned to each of such counties, shall be the amount to be taxed to the extent of the assessment in each county. (Acts 1889, p. 29.)

Whenever the Comptroller General shall ascertain and levy in the manner specified the amount of tax due by such company to each of such counties, it shall be his duty at once to notify the president and treasurer of such railroad company of the amount due in each of said counties for county taxes of said railroads, and each and every road is required, on or before December 20th in each year, to pay to the tax collector of each county through which the railroad runs the amount stated by the Comptroller General as the tax due to such county. (Acts 1889, p. 29; 1917, p. 195.)

"92-2705. (1040) Manner of issuing executions—If any railroad company shall refuse to pay the amount thus ascertained and due by it to the tax collector of any county to which the same is due and payable, it shall be the duty of the Comptroller General to issue and execution in the name of the State against such railroad company for the same, to be issued, levied, and return in the same manner as tax executions are issued for State taxes due in the State by said companies. (Acts 1889, p. 29.)

"92-2706. (1041) Affidavit of illegality to resist tax.—If any railroad company desires to dispute its liability to such county tax, it may do so by an affidavit of illegality, to be made by the president of said railroad or other officer thereof having knowledge of the facts in the same manner as other affidavits of illegality are made, and shall be returned for trial to the superior court of the county where such tax is claimed to be owing and where it is sought to be collected, where such cases shall be given precedence for trial over all other cases, except tax cases in which the State shall be a party. (Acts 1889, p. 29; 1916, p. 34; 1927, p. 136.)"

(5) Act approved December 24, 1890, Georgia Laws 1890-1891, p. 152, codified in Code Sections 92-2801, 92-2802, and 92-2804.

"92-2801. (872) Property of railroads subject to municipal taxation.—All property, real and personal, belonging to railroad companies in this State, which is within the limits of any municipality as fully and as completely as is the property of other corporations within the limits, and it is the duty of the municipal authorities to cause property belonging to a railroad company to pay its proper and just share of municipal taxes. (Acts 1890-1, p. 152.)

"92-2802. (873) Return to show what.—In addition to the facts required to be shown by Chapter 92-27, providing a system of railroad property taxation in each of the counties, every railroad company in this State shall, at the time of making the returns provided for in said Chapter, show the value of the company's property in each incorporated city or town through which it runs. (Acts 1890-1, p. 152)

"92-2804. (875) County tax law applicable.—All other provisions of Chapter 92-27 are made applicable to the assessment and collection of taxes by municipalities upon the property of railroads located in such municipalities, and upon the rolling stock and other personal property. (Acts 1890-1, p. 152.)"

(6) Act approved August 14, 1908, now codified in Sec. 92-6005, Code of 1933.

"92-6005 (1054) Returns of railroad companies for county, municipal, and school tax purposes.—The returns of railroad companies for purposes of county and musicipal and school taxation shall be subject to the same inspection, objection and assessment by the Comptroller General, and arbitration, as is provided by law for returns of such property for purposes of State taxation (Acts 1908, p. 24)."

(7) Act approved July 31, 1918, now codified in Chapter 92-61 of the Code of 1933.

"92-6101. Undervaluation of property or failure to return. -When the owner of property has omitted to return the same for taxation at the time and for the years the return should have been made, or, having returned his property or part of same, has grossly undervalued the property returned or his property has been assessed for taxation at a figure grossly below its true value, such owner, or, if dead, his personal representative or representatives, shall return the property for taxation for each year he is delinquent, whether delinquency results from failure to return or from gross undervaluation, either by the delinquent or by assessors, said return to be made under the same laws, rules and regulations as existed during the year of said default, or the year in which said property was returned or assessed for taxation at figures. grossly below its true value: Provided, that no lien for such taxes shall be enforced against any specific property which has been previously alienated or incumbered, and is in the hands of innocent holders without notice. (Acts 1918, p. 232.)

"92-6102: Notice and demand by Comptroller to file return.

—When the owner of said property, or, if dead, his personal representative or representatives, refuses or fails to make returns in cases of property which should have been returned to the Comptroller General, the Comptroller General shall notify, in writing, such owner or his personal representative or representatives of his delinquency, demanding that a return shall be made thereof within 20 days. (Acts 1918, p. 233.)

"92-6103. (1136) Assessment of value by Comptroller; issue of excessiveness.—If the delinquent or his personal representative or representatives, as provided for in section 92-6102, refuses or fails to return such property after the notice given, or returns it below what the Comptroller General deems its value, the Comptroller General shall assess such property for taxation for State, county, or municipal and school purposes, from the best information he can obtain as to its value, for the

current year, and for each year in default, and notify such delinquent or his personal representative or representatives of the valuation, which valuation shall be final, unless the person or persons so notified shall raise the question that it is excessive, in which event the further procedure shall be as provided by section 92-6001. (Acts. 1918, p. 233.)

"92-6104. Issue of taxability, where tried.—If the delinquent under section 92-6102 disputes the taxability of such property, he may raise the question by petition in equity in the superior court of Fulton county, and if such delinquent is dead, his personal representative or representatives shall have the same right. (Acts. 1918, p. 234.)"

(8) Act approved August 25, 1927, Georgia Laws 1927, p. 97, now codified in Sec. 92-5902 of the Code of 1933.

"92-5902. Returns by public utilities made to whom.—All persons or companies owning or operating railroads . . . shall be required to make annual tax returns of all property located in this State to the Comptroller General; and the laws now in force providing for taxation of railroads in this State shall be applicable to the assessment of taxes on the businesses above stated."

(9) Act approved March 30, 1937, Georgia Laws 1937, p. 497, codified in Sec. 92-5811 of the Code of 1933.

"92-5811. Unreturned and undervalue personal property to be assessed.—Where the owner of such property has omitted to return such property for taxation at the time and for the year that return should have been made, or, having returned such property, has grossly undervalued same, the Commission through its deputies or agents shall require such delinquent or defaulting taxpayer to make a proper return, or return the omitted property, and the same shall be assessed in the manner and method prescribed in Chapter 92-61. (Acts 1937, p. 497.)"

(10) Reorganization Act approved January 3, 1938, Georgia Laws Extra Session 1937-1938, p. 77.

"Section 4. The State Revenue Commissioner . . . is hereby vested with all the powers and authority and required to perform all the duties relating to matters of petroleum inspection, taxation and licenses heretofore vested in the Comptroller General (except licenses to insurance companies and their agents) and he is also vested with all the powers and authority and required to perform all the duties relating to taxation and licenses heretofore vested in any state administrative officer or State Department, but the powers and authorities by this section vested in the State Revenue Commissioner shall be the powers and authorities of said officers as modified, limited and enlarged by this Act."

(Sections 18 through 23 create a Board of Tax Appeals and provide for its procedure.)

"Section 24. Repeal of Certain Code Sections.—The following provision of Title 92 ("Public Revenue") of the Georgia Code of 1933 are hereby repealed. Sections 92-6001-92-6007, inclusive, relating to arbitration of assessments or correction of returns made by the Comptroller General, and 92-7004-92-7006, inclusive, relating to arbitration of State Revenue Commission's equalization of County assessments.

"Section 34. Refunds.

"(b) Procedure for Granting. In any case in which it shall be determined that an erroneous or illegal collection of tax or license has been made by the Commissioner, the taxpayer from whom such tax or license was collected may file a claim for refund with the said Commissioner in writing and in such form and containing such information as the Commissioner may require, to include a summary statement of the grounds upon which the taxpayer relies. In the event the taxpayer desires a conference or hearing before the Commissioner in connection with any claim for refund, he shall so specify in writing in the claim, and if the claim conforms with the requirements of this section the said Commissioner shall grant such a conference at a time he shall specify. The Commissioner shall consider information contained in taxpayer's claims for refund and such other information as may be available and shall approve or disapprove the taxpayer's claim and notify such taxpayer of his action. In the event any claim for refund is approved, the Commissioner shall forthwith proceed under subsection (a) of this section to give effect to the terms thereof. Provided, further, that the taxpayer whose claim for refund is denied by the Commissioner under the terms of this Act, shall have the right to sue for refund in the Superior Court of the County in which said taxpayer would have a right to appeal from a judgment by the Board of Tax Appeals, as in this Act, provided.

"Section 44. Appeal from the Commissioner's Findings, The Commissioner's assessment shall not be reviewed except by the procedure hereinafter provided; no trial court shall have jurisdiction of proceedings to question such assessments except as in this Act provided. If any taxpayer shall be aggrieved by any assessment which the Commissioner may make, he may within thirty (30) days from the date when the assessment is finally made and notice thereof given to the taxpayer file with the Board of Tax Appeals a petition for review. The request for review may be accompanied by a copy of the taxpayer's return as filed with the Commissioner and of any special accounting or other report thereon which the Commissioner may have made or required to be made. Both the Commissioner and the taxpayer shall have the right to introduce before the Board of Tax Appeals any evidence or data which said Board may rule to be pertinent or relevant, whether it was introduced originally before the Commissioner or not. The filing of any such petition shall not abate penalties for nonpayment unless such appeal is finally decided in favor of

the taxpayer, nor shall it stay the right of the Commissioner to collect the tax which is admitted to be due, by any methods available to him under the law, unless the taxpayer shallfurnish security of a kind and in amount satisfactory to the Commissioner. Where the Commissioner is required by law to certify to any county or muricipal government of this State all or any part of an assessment or tax against any taxpayer, and the taxpayer disputes the correctness of said assessment or tax as determined by the Commissioner, the Commissioner is hereby directed to certify to said county and municipal government the value of the property of the taxpayer and/or the tax admitted by him in his return to be due, and after a final determination of the balance of said assessment or tax in dispute shall make a supplemental certification to said counties and municipal governments as may be finally determined. It shall be the duty of the taxpayer to pay, as required by law, any taxes that may be assessed by the State, county or municipal governments, both upon the original value as shown in his return as well as upon its supplemental value that may finally be determined as in this Act provided.

"Section 45. Review of Board's decisions. Jurisdiction of the Superior Courts. The findings of the Board of Tax Appeals shall not be final; but either party may appeal from any order, ruling, or finding of the said Board to the Superior Court of the county of the residence of the taxpayer unless the taxpayer be a railroad or other public service corporation or non-resident, in which event the appeal of either party shall be to the Superior Court of the County in which is located its principal place of doing business, of in which the chief or highest corporate officer, resident in the State, maintains his office. The appeal and necessary records shall be certified and transmitted by the Chairman of the Board and shall be filed with the Clerk of the Superior Court within thirty (30) days from the date of judgment by the Board. The procedure provided by law for applying for and granting appeal from the Court of Ordinary to the Superior Court shall apply as far as suitable to the appeal authorized herein, except that the appeal authorized herein may be filed within fifteen (15) days from the date of judgment by the Board.

"Before the Superior Court shall have jurisdiction to entertain such appeal filed by any aggrieved taxpayer, such taxpayer shall file with the Clerk of the Superior Court a writing whereby such taxpayer shall agree to pay on the date or dates the same shall become due all taxes for which such taxpayer has admitted liability and shall within thirty (30) days from the date of judgment by the Board file with the Clerk of the Superior Court, except where appellant owns real property in Georgia, the value of which is in excess of the amount of the tax in dispute, a bond in amount satisfactory to such Clerk or other security in amount satisfactory to such Clerk conditioned to pay any tax over and above that which the taxpayer has admitted liability for which shall be found to be due by a final judgment of court, together with interest and costs. It shall be ground for dismissal of the appeal if the taxpayer fails to pay all taxes admittedly owed upon the due date or dates as now or hereafter provided by law. .

"If the final judgment of court places upon the taxpayer any tax liability which he has not already paid, he shall pay the same on the due date or dates now or hereafter fixed by law if the tax or any of same has not become due on the date of said final judgment of court. And if the tax or any of same has already become due at the time of final judgment of court, the taxpayer shall immediately pay the tax or so much thereof as has already become due, with interest, and shall pay the court costs, in the event the final judgment of court is adverse to the taxpayer, no matter whether the tax or any part of same has or has not become due at the time of said final judgment of court."

⁽¹¹⁾ Act approved February 17, 1943, Georgia Laws 1943, p. 204.

[&]quot;Section 2. That said Act of January 3, 1938, be, and the same is hereby further amended by striking and repealing all

Sections 18, 19, 20, 21, 22, 23 and 24 of Chapter III thereof, which said sections create a State Board of Tax Appeals, and provide for the review of decisions of the State Revenue Commissioner, and substituting in lieu thereof new sections to be numbered section 18, section 19, and section 20, which shall read as follows:

"Section 18. Except as otherwise provided by this Act, all matters, cases, claims and controveries, of whatsoever nature arising in the administration of the revenue laws, or in the exercise of the jurisdiction of the State Revenue Commissioner. or the Department of Revenue, as conferred by this act, shall be for determination by the State Revenue Commissioner, subject to review by the courts as provided for by Section 45 of Chapter IV of this Act. The effect of this section shall be that, except as hereinafter provided, all final rulings, orders and judgments of the State Revenue Commissioner shall be subject to appeal and review under Section 45 of this act in the same manner, under the same procedure, and as fully, as if same had been considered and passed upon by the Board of Tax Appeals. Any such appeal from a final ruling, order, or judgment of the State Revenue Commissioner shall be entered within the time prescribed by Section 45 of the Act; Provided, however, that nothing herein contained, and no provision of this Act. shall be construed to deprive a taxpayer against whom an execution for taxes has been issued under an assessment by the State Revenue Commissioner of the right to resist enforcement of the same by affidavit of illegality.

"'All petitions for review filed and now pending before the Board of Tax Appeals shall be and they are hereby declared to be in the same position as if the ruling, order, finding or assessment of the Commissioner therein complained of and sought to be reviewed had been affirmed by the Board of Tax Appeals; and all such rulings, orders, findings or assessments now pending for review before the Board of Tax Appeals shall be final and conclusive unless the taxpayer who filed said petition for review shall, within thirty (30) days from the date of the passage of this Act, appeal said ruling, order, finding or assess-

ment to the Superior Court in the manner provided by Code Section 92-8446, except that in the case of a foreign corporation domesticated in Georgia the appeal shall be made within the time herein prescribed to the Superior Court of the County in which such foreign corporation was domesticated in Georgia.'

"'Section 19. The provisions of the foregoing section with reference to reviewing assessments of the State Revenue Commission shall not apply to assessments for ad valorem taxation against any person, corporation or company which was required by Chapter 92-59 of the Code of 1933 to return his or its property for ad valorem taxation to the Comptroller General and is now required by such chapter and this Act of January 3, 1938, to make such returns to the State Revenue Commissioner. The State Revenue Commissioner shall carefully scrutinize such returns made to him, and if in his judgment the property embraced therein is returned below its value or the return is false in any particular, or in any wise contrary to law, he shall, within sixty days thereafter, correct the same and assess the value, from any information available. If any such person, corporation or company shall be dissatisfied with the assessment or correction of such returns as made by the State Revenue Commissioner or the Department of Revenue, such taxpayer shall have the privilege, within twenty days after notice of such assessment and correction, to refer the question of true value or amount to arbitrators as provided for by Chapter 92-60 of the Code of Georgia of 1933. Such arbitrators shall consist of one chosen by the taxpayer and one chosen by the Governor. If the arbitrators thus chosen shall be in disagreement, they shall choose an umpire. If such arbitrators disagree and fail to select an umpire within thirty days after receiving notice of their appointment, the Chief Justice of the Supreme Court of Georgia shall select an umpire. Every arbitrator or umpire chosen hereunder shall be a citizen of Georgia. The award shall be made by the arbitrators or by the arbitrators and the umpire, as the case may be, within thirty. days from the appointment or selection of such umpire. The decision and award of the arbitrators or of the arbitrators and

the umpire shall be subject to appeal and review in the same manner as decisions and orders of the State Board of Tax Appeals were subject to appeal and review under the terms of Section 45 of This Act.'

"'Section 20. Sections 92-7004 to 92-7006 of the Code of Georgia of 1933, which relate to arbitration of State Revenue Commission's equalization of county assessments are hereby repealed. Chapter 92-60 (Section 92-6001 to 92-6007) of the Code of Georgia of 1933, as modified by the provisions of the foregoing Section 19, shall continue and remain in full force and effect as if fully set forth herein.'

"Section 3. All laws and parts of laws in conflict with this Act are hereby repealed.

- III. Constitution provision attempting to revoke tax exemptions.
- (1) Article I, Section 3, Paragraph II of the Constitution of Georgia as amended in 1945, Georgia Laws 1945, p. 14.

"Paragraph II. Revocation of tax exemptions. All exemptions from taxation heretofore granted in corporate charters are declared to be henceforth null and void."

- IV. Constitutional and statutory provision authorizing Attorney General to represent State in prior litigation, as self out in Georgia Code of 1895.
- (1) Constitution of Georgia of 1877, Article VII, Section 10, Paragraph II, Code Sec. 5860(a).

"Section 5860 (a).

"It shall be the duty of the attorney-general to act as the legal adviser of the Executive Department, to represent the State in the Supreme Court in all capital solonies, and in all civil and criminal cases in any court when required by the Governor, and to perform such other services as shall be required of him by law."

(2) Code provisions, Georgia Code of 1895.

"Sec. 23. When any suit is instituted against the State, or against any person, in the result of which the State has an interest, under pretense of any claim inconsistent with its sovereignty, jurisdiction or rights, the Governor shall, in his discretion, provide for the defense of such suit, unless otherwise specially provided for."

"Section 220. It shall be the duty of the Attorney-General ... to represent the State . . . in all civil and criminal cases in any court when required by the Governor."

"Sec. 123. He (the Governor) shall have general supervision over all property of the State, with power to make all necessary regulations for the protection thereof, when not otherwise provided for."

"Sec. 126. Whenever the Covernor, after consulting with the attorney-general, or without, if there is no such officer, shall deem it proper to institute a suit for the recovery of a debt due the State or money or property belonging to the State, he is authorized and required to institute such suit in the proper court of this State, with the same rights as any citizen, and to require the aid of the attorney-general to begin and carry on such suits where practicable, and if not, some other suitable and competent attorney, on such terms, as to compensation, as he may agree upon, but the fees of such attorney shall be conditional."

Sec. 137. Whenever the Governor has trustworthy information that the State Treasurer or comptroller general is insane, or has absconded or grossly neglects his duties, or is guilty of conduct plainly violative of his duties, or demeans himself in office to the hazard of the public funds or credit of the

State the Governor shall suspend said treasurer, or comptroller-general, as the case may be, and report his reasons for such suspension to the General Assembly. Said suspension shall continue until the General Assembly shall otherwise direct."

"Sec. 139. The Governor may suspend the collection of the taxes, or any part thereof, due the State, until the meeting of the next General Assembly, but no longer; nor shall he otherwise interfere with the collection thereof."

"Sec. 222. It is in the discretion of the Comptroller General to require the Attorney General, when the services of a Solicitor General are necessary in collecting or securing any claim of the State, in any part of the State; either to command the services of said Attorney General in any and all such cases, or the Solicitor Generals in their respective circuits."

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CHARLES!

IN THE

Supreme Court of The United States

October Term, 1951

No. 1

GEORGIA RAILROAD & BANKING COMPANY, Appellant

VS.

CHARLES D. REDWINE, State Revenue Commissioner,

REPLY OF APPELLANT
TO ANSWER OF APPELLEE
TO MOTION TO TERMINATE CONTINUANCE

ROBERT B. TROUTMAN FURMAN SMITH Counsel for Appellant

Spalding, Sibley, Troutman & Kelley 434 Trust Company of Georgia Bldg. Atlanta, Georgia of Counsel for Appellant.

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Supreme Court of The United States

October Term, 1951

No. 1

GEORGIA RAILROAD & BANKING COMPANY,
Appellant

VS.

CHARLES D. REDWINE, State Revenue Commissioner,
Appellee

REPLY OF APPELLANT
TO ANSWER OF APPELLEE
TO MOTION TO TERMINATE CONTINUANCE

 Order does not require appellant to exhaust all possible remedies.

Appellee contends that the order of this Court of February 20, 1950, requires appellant to exhaust, seriatim, each and every remedy which appellee may suggest. Appellant does not so construe that order. Appellant believes that that order requires appellant to assert only the "plain" remedy which "the Attorney General of Georgia stated at the bar of this Court" to be available. The only remedy stated by the Attorney

General of Georgia at the bar of this Court was by appeal from the assessment of the State Revenue Commissioner to the Superior Court of Richmond, County, Georgia. Appellant has asserted that remedy, and the Supreme Court of Georgia on its own motion held that the remedy was not available and ordered the appeal dismissed for want of jurisdiction.

2. There is no other plain remedy available to appellant.

The assertion of appellee that there are other remedies available to appellant in the courts of Georgia is directly and flatly contrary to his recent assertion to the Supreme Court of Georgia that "the construction placed upon the Act of 1943 [by the Supreme Court of Georgia] takes away from the railroad the only remaining method of judicial determination of questions of taxability" so that the statutes of Georgia are unconstitutional as denying due process of law. The statements of appellee are quoted in our motion at p. 3-4.

That there is no "plain" remedy available to appellant is shown in detail in appellant's brief on the merits at pages 39-41.

In his answer, appellee does not say that any of the remedies suggested by him is "plain".

3. Refusal to modify injunction pending appeal.

On page 4 of his answer appellee complains that appellant set out in full the letter of March 30, 1950, without explaining appellee's reason for refusing to bring suit against the railroad to collect the tax. In our original motion we made no point of appellee's refusal to sue but made reference only to the first numbered paragraph of the letter. The letter was copied in full only to avoid any charge of submitting fragmentary evidence to the Court.

Appellee says that appellant refused to agree to a modification of the injunction pending appeal in order to permit such suit. Appellant did not refuse to agree to such modification of the injunction.

At the opening of the conference referred to in our letter of March 30, 1950, the Attorney General announced that he had decided not to bring suit against the railroad to collect. the tax as suggested by appellant. He did not then elaborate his reasons. He has not replied to our letter of March 30, 1950. However, counsel for the several counties and cities did make extended answer, in which he stated reasons for not entering suit to collect the tax. We considered that some of the objections raised by him were not without validity, and neither side pursued further the suggestion that the appellee or the State of Georgia bring suit against the railroad. No request or suggestion was made that the injunction be modified so as to permit suit for the taxes to be entered. Counsel for appellee and for the cities and counties definitely and positively adhered to their position that the remedy of appellant was by appeal. This procedure was subsequently followed. Appellant would have consented to a modification of the injunction to permit a suit for the tax, if such procedure had been approved by counsel for appellee.

Thereafter counsel for appellant and counsel for appellee agreed on the form of order modifying the injunction pending appeal. The copy of the order modifying the injunction pending appeal, on pages 9-10 of the appendix to the brief of amici curiae, does not show that order in full and does not show that it was in fact a consent order signed by counsel for appellee. It was prepared by counsel for appellee.

At the time that order was prepared, neither party mentioned the possibility of appellee or the State suing appellant. That suggestion had then been apparently abandoned by both parties.

4. Appellant is not responsible for delay.

Appellant has brought three different proceedings* to secure an adjudication of the issues involved in this case. Appellee has had an opportunity to accept such procedure either in the State Court or in the Federal Court. He vigorously and successfully resisted the proceeding brought by appellant in the State Court for declaratory judgment and injunction, also the proceeding brought by appellant in the Federal Court for injunction. If appellee had accepted either of such remedies, the issues involved in this case would have been long since settled. His erroneous assurance to this Court that the remedy by appeal was "plain", has caused nearly two years of additional delay. He now insists that appellant must try seriatim at least three more remedies, and perhaps more, before asking this Court to decide the case.

If the Courts of Georgia should decide that one of such remedies will lie, which appellant believes unlikely, even so the issues must ultimately be decided by this Court, for this case turns on the construction and effect of the Constitution of the United States, on which this Court must be the final arbiter. Appellant respectfully suggests that the issues have already been squarely presented to this Court and the case can be finally disposed of immediately by this Court. There is no other possible method by which this case can be disposed of without years more delay.

Respectfully submitted,

ROBERT B. TROUTMAN
FURMAN SMITH
Counsel for Appellant

Spalding, Sibley, Troutman & Kelley 434 Trust Company of Georgia Bldg. Atlanta, Georgia

of Counsel for Appellant.

⁽¹⁾ Suit for declaratory judgment and injunction in the State Court; (2) Suit for injunction in the Federal Court; and (3) Appeal to the State Court.

Before the undersigned, an officer authorized to administer oaths, personally appeared FURMAN SMITH, who, being sworn, says that he is of counsel for appellant and that the facts stated in the foregoing Reply are true.

FURMAN SMITH

Sworn to and subscribed before me this 8th day of October, 1951.

GENEVIEVE G. JOHNSTON, Notary Public

Notary Public, Fulton County, Georgia My Commission Expres April 4, 1954. LIBRARY

Office Supreme Court, U.S. FILMD NOV12 1949

SUPREME COURT OF THE UNITED STATES OF THE

OCTOBER TERM, 1951

No. *** Y

GEORGIA RAILROAD & BANKING CO.,
Appellant,

CHARLES D' REDWINE, STATE REVENUE COMMISSIONER

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MOTION TO DISMISS OR AFFIRM

EUGENE COOK,
Attorney General of Georgia;
M. H. Blackshear, Jr.,
Assistant Attorney General of Georgia,

Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 454

GEORGIA RAILROAD & BANKING CO.,

Appellant,

17.8

CHARLES D. REDWINE, STATE REVENUE COMMISSIONER

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MOTION TO DISMISS THE APPEAL AND AFFIRM THE JUDGMENT OF THE COURT BELOW

The appellee, believing that the matters set forth below will demonstrate the lack of substance in the questions raised by this appeal, files this his motion to dismiss the appeal and to affirm the judgment of the District Court on the ground that the questions raised on behalf of appellants are so unsubstantial as not to require further argument.

While the cause is one which would otherwise be reviewable by the Supreme Court on direct appeal from the District Court, appellee asserts that the unsubstantial character of the grounds stated by appellant is so apparent on the face of the record as to warrant the Court in summarily disposing of the appeal at this stage of the proceeding.

The matters here relied upon by appellee are more particularly stated as follows:

1

The face of the record, especially the opinion of the majority of the Court, shows clearly that the action dismissed is one against the State of Georgia to which the State has not given its consent to be sued, and hence the District Court for the Northern District of Georgia had no jurisdiction over the case.

2

The record shows that the case of Musgrove v. Georgia Railroad & Banking Company, 204 Ga. 139, 49 S. E. 2d, 26, appealed to the United States Supreme Court and appeal dismissed at the last term of the Supreme Court, Georgia Railroad & Banking Co. v. Musgrove, 335 U. S. 900, in which the identical issues were determined as are raised in the case at Bar, is res judicata as to all the issues raised in this case. The record shows that plaintiff, completely ignoring the judgment now sought to be enforced, deliberately went into the courts of the State of Georgia and sought another judgment on almost identical allegations as were brought on the District Court below in the case at Bar. The Supreme Court of Georgia having thus determined the issues adversely to the Georgia Railroad & Banking Company, and its decision having been affirmed by the Supreme Court of the United States, this present appeal in a case attempting to raise again the identical issues should be dismissed as being barred by the doctrine of res judicata. This decision in the Supreme Court of. Georgia, being the latest of two conflicting decisions on the same question, supervenes the judgment hereis sought to be enforced: hence, the present appeal is too unsubstantial to require further argument and consideration by the Court. See authorities cited on this question in the majority opinion of the Court below.)

3

The Court below correctly dismissed the action because of lack of jurisdiction to grant the relief prayed, because, as set forth in the answer and motion to dismiss the petition in the Court below, the appellant has ample remedies in the courts of Georgia to resist the collection of the taxes if it has any right to an exemption.

· U. S. C. A., 28-1341 (1948):

"The District Court shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under the State law where a speedy and efficient remedy may be had in the courts of such State."

4

The request of defendant for admission under Rule 36 not answered or denied by plaintiff, shows that even had there been a valid contract between the State of Georgia and the Georgia Railread & Banking Company whereby perpetual tax exemption was granted as claimed by plaintiff, the Georgia Railroad & Banking Company violated the terms of said contract by failing to construct the lines of railroad provided by the charter. Hence, it follows that the Federal Constitution does not protect a contract which a plaintiff has itself violated by failing to perform the terms thereof.

Bacon v. Texas, 163 U. S. 207;

State v. Morgan, 28 La. 490;

Pennsylvania College Cases, 80 U.S. 190;

- Town of Henckley v. Kettle River Railroad Co., 70 Minn. 105;
- Ravenswood S. & G. Railway Co. v. Town of Ravenswood, 41 W. Va. 732, 24 S. E. 597;
 - Long Island Water Supply Co. v. City of Brooklyn, 17 S. Ct. 722.

In the latter case, the Court says:

". . . A charter is not simply an executed grant, but a continuing contract. There is a duty of performance by the recipients of the grant which continues during the life of the charter."

5

ment to the Federal Constitution guarantees the equal protection of the laws to every citizen. And, if an iniquitous tax exemption denies the equal protection of the laws, the people of the State of Georgia may exercise their right to obtain this equal protection of the law by adopting the Constitution which repeals perpetual tax exemption. In adopting the Constitution of 1945 the people of Georgia took this step to provide the equal protection of the laws guaranteed by the 14th Amendment, this Amendment being of later date and thus superior to any provision of the original Constitution which conflicts with its provisions, such as the protection of a contract which of itself is a denial of the equal protection of the law.

Wherefore, appellee respectfully submits this statement showing that the questions upon which the decision of this cause depends are so unsubstantial as not to require further argument, and appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment of dismissal entered in the Court below.

EUGENE COOK,

The Attorney General;

M. H. Blackshear, Jr.,

Assistant Attorney General.

BUPREME COURT, U.

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CHARLES ELMORE GROPLEY

In the SUPREME COURT OF THE UNITED STATES

October Term, 1949 1951

| No. 454 %

GEORGIA RAILROAD & BANKING COMPANY,
Appellant,

CHARLES D. REDWINE, STATE REVENUE COMMISSIONER, Appellee.

Appeal from the United States District Court for the Northern District of Georgia

Brief for Appellee

EUGENE COOK,
Attorney General of Georgia
M. H. BLACKSHEAR, JR.,
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EDWARD E. DORSEY, Atlanta, Georgia,
Of Counsel.

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In the SUPREME COURT OF THE UNITED STATES

October Term, 1949

No. 454

GEORGIA RAILROAD & BANKING COMPANY,
Appellant,

CHARLES D. REDWINE,
STATE REVENUE COMMISSIONER,
Appellee.

Appeal from the United States District Court for the Northern District of Georgia

Brief for Appellee

STATEMENT OF THE CASE

In the judgment of counsel for the Appellee, a more complete statement of the case will make possible a more lucid and logical development of the principles relied upon to sustain the judgment of the District Court.

This appeal is from the decision 1 of a three judge District. Court dismissing the complaint of the Georgia Railroad & Banking Company against Charles D. Redwine, who is Revenue Commissioner of Georgia, for the reason that it is a suit which, in substance and effect, is against the State of Georgia, and to which that State has not consented. The avowed purpose of that suit was to implement and enforce a decree rendered by the Circuit Court of the United States for the

¹ Ga. R. R. & Bkg. C8. v. Redwine, 85 F. Supp. 749.

Northern District of Georgia on July 3, 1907, in Georgia Railroad & Banking Company v. Wright 2, 132 Fed 912, as modified and affirmed by this Court in Wright v. Georgia Railroad & Banking Company 2, 216 U. S. 420, (R. 1, Par. 4 of Complaint). The injunction is sought against Redwine as a wrongdoer.

THE WRIGHT, CASE

The Wright case began when, on January 7, 1904, the Georgia Railroad & Banking Company filed complaint in the Circuit Court of the United States for the Northern District of Georgia against "William A. Wright, a citizen of the State of Georgia, resident of the Northern District thereof, in the City of Atlanta." (R. 29.) By this bill of complaint it was alleged that William A. Wright was the Comptroller-General of Georgia, (R. 32, Par. 14 of Complaint), and that "William A. Wright, who is the Comptroller-General of the State of Georgia, acting as such Comptroller-General, insists that your orator shall pay to the State of Georgia, to fifteen counties of said State, and numerous municipalities through which your orator's said railroad passes, a property tax on-(\$1,990,756.00) dollars said sum representing the alleged excess in value of your orator's investments in its said railroad over and above the par of your orator's capital stock-the tax thus demanded being for the year 1963 \$20,000 or other large sum." (R. 34, Par. 20 of Complaint.)

The bill of complaint further alleged that the defendant's efforts to collect these taxes were based upon the Act of the Legislature of Georgia of December 17, 1902, and that "said threatened action of said Comptroller General and said Act of the Legislature of Georgia of December 17, 1902, would impair the obligation of said contract, and are unconstitutional, null and void under Paragraph 1 of Article 10 of the Amendments to the Constitution of the United States." (R. 35, Par. 23 of Complaint.) Other allegations of the bill make it clear that the contract which Georgia Railroad &

² For convenience, this case will be hereafter referred to throughout as the "Wright Case." No other case will be so identified.

Banking Company thus sought to protect was its perpetual charter granted by legislative enactment and which it claimed

to be a contract forever limiting its obligation to pay taxes.

The prayers of the complainant were that it be adjudged "not liable for a property tax on its railroads aforesaid or any tax on its franchises, and that the only tax for which your orator is liable is a tax to the State only, not to exceed one-half of one per cent of the net earnings of this orator's investments in its railroads," and that "the said William A. Wright, Comptroller-General, he enjoined from issuing any execution or taking any step to collect any tax from your orator other than one-half of one per cent of the net earnings of its investments or any tax on your orator's franchise," and for "other and further relief such as the case may require and equity may afford." (R. 37.)

Service of subpoena was acknowledged "William A. Wright, by John C. Hart, attorney at law and Attorney General of: Georgia." (R. 41.) Various responsive pleadings were filed, in the caption of which the Georgia Railroad & Banking Company is shown as Plaintiff; and William A. Wright is shown as Defendant. By demurrer defendant made the point, among others, that "said bill upon its face shows the same. to be a suit between a citizen of the State of Georgia and said State, or a citizen thereof, and no federal question is presented by said bill." (R. 45.) All demurrers were overruled (R. 73) and, after hearing, the Circuit Court rendered a decree adjudging that the Act of December 21, 1833, was a vand and binding contract between the State of Georgia and the Georgia Railroad & Banking Company, and that this charter provided a system of taxation exclusive of all other taxation, and decreed that "defendant be perpetually enjoined from levying and collecting any taxes, State, county. or municipal, from said complainants not in accordance with this decree." (R. 84-85.)

Defendant assigned errors upon a number of points, including an assignment that the Court erred "in not sustaining the first paragraph of resemblent's demurrer to the bit as amended alleging that the amended bill presented no federal

question, was a suit between citizens of the same State, and the Court was without jurisdiction; ... (R. 89.)

In the opinion accompanying his decree, Circuit Judge Newman made no reference to Georgia's sovereign immunity from suit.

Appeal was perfected to this Court, and this Court affirmed the judgment of the Circuit Court with slight modification not here material. Wright v. Georgia Railroad & Banking Co., 216 U. S. 420. In its opinion, this Court did not deal with the question of sovereign immunity from suit, and throughout treats the suit as though Georgia were fully and properly a party thereto.

STATE DECLARATORY JUDGMENT SUIT

In 1945, acting pursuant to the mandate contained in the Georgia Constitution of 1945, the then Revenue Commissioner of Georgia called upon Appellant to make tax returns and expressed it as his purpose to assess property taxes against Appellant upon all of its property and upon its franchises.

Georgia Railroad & Banking Company thereupon sought, by suit in the State courts of Georgia, declaratory and injunctive relief against the threatened assessment. This relief was denied. Musgrove v.: Georgia Railroad & Banking Co., 204 Ga. 139. App. dis., 335 U.S. 900.

THE CASE AT BAR

Thereupon, Georgia Railroad & Banking Company filed the suit at bar against Appellee, alleging the continued threats of Charles D. Redwine, the present Revenue Commissioner of Georgia, to assess and undertake to collect property taxes, and describing the instant case as an "ancillary and supplemental action to enforce and carry out the previous decree of this Court," (R. 1), namely that rendered by Circuit Judge Newman in the Wright Case, supra, as subsequently affirmed with modification by this Court.

Redwine answered by setting up various defenses in fact and in law, and moved the dismissal of the complaint, for the reason and upon the ground that the suit was, in substance and effect, a suit against the State of Georgia, prohibited by the Eleventh Amendment to the Constitution, and that the State had not consented to be thus sued. (R. 10.)

The case was brought on for a hearing before a three judge District Court constituted as provided in Title 28 U.S.C., Sec. 2281, upon Appellant's motion for a summary judgment, which motion in turn rested upon the pleadings and the response to a request for admissions, as well as upon the Appellee's motion to dismiss. The District Court concluded that the action was, in its purpose and effect, a suit against the State of Georgia, that Georgia had not consented to be sued, and that the judicial power of the United States District Court did not extend to such a suit. (R. 170.) The District Court decided none of the other questions made by the pleadings.

The preceding statement includes only certain of the facts set out in the pleadings or in the proof made by Appellant in support of its motion for summary judgment. Although somewhat more detailed, it is not intended as a statement of all procedural and evidentiary facts in the several suits which are pertinent to the legal issues presented by this appeal. It is primarily intended to serve as a frame of reference for the statement of questions presented and Appellee's positions thereon.

SUMMARY OF ARGUMENT

I

The judgment of the District Court dismissing the complaint was proper for the reason that the suit was, in substance and effect, one against the State. As a matter of law, Georgia had not consented to be sued. No action taken by Wright, then Comptroller-General, in the Wright case, supra, by way of defending that suit, or by the Governor in permitting its defense, or in directing its defense (if he did so direct it), or by the Attorney General in participating in the case, constituted a waiver of the sovereign immunity which the State of Georgia enjoys under the Eleventh Amendment.

The Governor, the Attorney General, and the Comptroller-General were without power or authority to waive Georgia's sovereign immunity, this power being subject to exercise only by the Legislature. Georgia did not, by inaction or acquiescence in the decision rendered in the Wright case, become estopped from raising the issue of sovereign immunity from suit in the case at bar, nor did Redwine who is Georgia's Revenue Commissioner, become estopped from raising the issue that a suit nominally against him is, in legal effect, a forbidden suit against the State. The judgment in the Wright case, supra, did not and does not bind the State of Georgia, because it had not consented to be bound, nor does that judgment bind Redwine, personally or officially, there being no privity between Wright, the former Comptroller-General, and Redwine, the present Revenue Commissioner.

H

The District Court's judgment of dismissal was proper for the further reason that plain, speedy, and efficient remedies are provided by Georgia: by appeal from any adverse decision of the Revenue Commissioner upon the question of taxability; by payment of any taxes assessed on behalf of the State of Georgia, and suit for refund; by statutory affidavit of illegality; and, if the foregoing remedies prove inadequate, by suit in equity in the Superior Court of Fuiton County, Georgia.

III

In no event should the District Court have sustained Appellant's motion for summary judgment. Considered either as a bill for relief ancillary to the judgment in the Wright case, supra, or as a new and independent suit, Appellant demonstrates no legal right to have relief because the Legislature was without authority when the first charter was granted and at all times thereafter material to this suit, to enter into a perpetual contract on behalf of the State of Georgia alienating a portion of the sovereignty of that State. Properly construed, the Georgia Constitution of 1798 expressly forbade the Legislature to exercise such power, and

prior to the passage of the first Act incorporating and chartering Appellant, and since that Act, the Supreme Court of Georgia has repeatedly construed the Legislature's power as being so limited. In addition to the judicial constructions on legislative power in this particular, both the legislature and the electorate have interpreted and enunciated this same lack of legislative power by enactment of the Constitution of 1877 and that of 1945. Language in decisions apparently to the contrary does not foreclose this issue, because such expressions were either obiter dicta or contained in suits to which the State was not a party.

So much of the several acts of incorporation as purport to grant Appellant a perpetual limitation upon its tax obligations, if valid when enacted, were subsequently rendered unconstitutional and void by the adoption of the Fourteenth Amendment to the Constitution of the United States as denying to other taxpayers and other classes of taxpayers the equal protection of the laws.

Should it be determined that this charter constituted a valid contract of tax limitation when granted and accepted and that it has not subsequently been rendered void by the adoption of the Fourteenth Amendment, Appellant should, nevertheless, have been denied the summary relief sought, for the reason that Appellant has failed to show a compliance with its obligations under that contract and has, in fact, failed to perform its obligations under that contract, thereby forfeiting its right to tax limitations.

IV.

Finally, if entitled to any summary relief, Appellant is not entitled to all of the summary relief asked, for the reason that the 67 mile branch from Madison to Atlanta was never included within the scope of the tax limitation provisions.

I. THE JUDGMENT OF THE DISTRICT COURT DISMISSING THE COMPLAINT. WAS PROPER FOR THE REASON THAT THE SUIT WAS, IN SUBSTANCE AND EF-

FECT, ONE AGAINST THE STATE OF ** GEORGIA.

The action is directed against the Commissioner of Revenue acting as an individual, and not as an officer of the State Government, Appellant contending that it seeks to prevent a tort by the Commissioner and that equitable relief is necessary because Appellant has no adequate remedy at law. Appellee contends that, regardless of the nominal parties to the suit, it is against the State, because Appellant seeks to enforce what it claims to be a contract with the State, and the State being a pary to the purported contract is, therefore, an indispensable party to the suit.

a. The case at bar, when considered as an independent suit, is, in effect, against the State.

As a party to the alleged contract, the State, as a corporate entity, has a distinct and direct interest in the subject matter of the litigation. Musgrove v. Georgia Railroad & Banking Co., 204 Ga. 139, App. dis., 335 U. S. 900.

If the relief prayed is granted, the alleged contract between Georgia and the Georgia Railroad & Banking Company will. be enforced. In the language of Mr. Justice Matthews in Hagood v. Southern, 117 U. S. 52, 67:

"... The things required by the decree to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State. The State is not only the real party to the controversy, but the real party against which relief is sought by the suit, and the suit is, therefore, substantially within the prohibition of the Eleventh Amendment to the Constitution of the United States. .."

It may truly be said here, as was said by Mr. Justice. Miller for this Court in Cunningham v. Macon & Brunswick Railroad Co., 109 U. S. 446, 457:

"The entire interest adverse to the plaintiff in this suit is the interest of the State of Georgia. . ."

Georgia may not be coerced by judicial action without

being a party to the suit. Louisiana v. Jumel, 107 U. S. 711. The suit raises questions of law and fact upon which the State of Georgia would have to be heard. The State's liability cannot be tried "behind its back." Louisiana v. Garfield, 211 U.S. 70. Mine Safety Appliance Co. v. Forrestal, 326 U.S. 371.

The grant of the injunction prayed would be substantially a decree directing specific performance of the contract which Appellant contends exists between it and the State of Georgia. Such a suit may no more be maintained against the Revenue Commissioner in his personal and individual capacity than it might be maintained directly against the State of Georgia. In Re Ayers, 123 U. S. 443.

Appellant contends that this action is not against the State, and relies upon Looney v. Crane Company, 245 U.S. 178, Allen v. B. & O. Railroad Company, 114 U.S. 311, Gunter v. Atlantic Coast Line Railroad, 200 U.S. 273, and the Board of Liquidation v. McComb, 92 U.S. 531.

Appellee, on the other hand, insists that none of these decisions require a decision against it, as a brief analysis will show.

Looney v. Crane, supra, involved no contract or other corporate rights of the State and, therefore the State was not an indispensable party for the purpose of determining the constitutionality of the tax statute there under attack.

Allen v. B. & O. Railroad, supra, was one of the Virginia-Coupon Cases. All of the coupon cases related to a Virginia statute authorizing the coupons of the State's funded debt to be received in payment of taxes, debts and demands due the State. Subsequent legislation practically forbade the receipt of these coupons in payment of taxes, and placed upon the holders the onerous task of making proof of their genuineness under procedure and rules of evidence which made this proof exceedingly difficult, if not impossible.

The Court was concerned with the same statutes and with the same coupons in the Allen case and in the Ayers case, supra.

In Allen v. B. & O. Railroad, supra, an injunction was granted restraining Allen, who was the Auditor of Public

Accounts, and the other Virginia officers, from collection of taxes by distraint upon the property of the Railroad, after the Railroad had tendered coupons in payment of these taxes. Such a suit was not within the prohibition of the Eleventh Amendment.

In the Ayers case, temporary restraining order had been granted against Ayers, who was Attorney General, at the suit of investors holding coupons for resale, which investors were not Virginia tax payers, restraining the institution of suits to collect taxes against those who had tendered tax coupons in payment of their taxes. Ayers was adjudged in contempt for instituting a suit, and sought his release by habeas corpus, contending that the restraining order was, in substance and effect, against the State in a suit brought without its consent.

Appellant suggests and argues that the distinction between suits which are prohibited as in substance against the State, and those which are permitted upon the theory that they are only against officers of the State acting beyond their valid authority, may be determined by comparing the Ayers case and the Allen case. Appellant further argues that in the Ayers case, the order of the Court was void because directing the Attorney General to dismiss suits, an act which he could do only by virtue of the powers of his office.

The two cases may not be distinguished for this reason. In the first place, it is not factually correct. The temporary restraint which this Court held to be void, did not require affirmative action.3

³ This court, in Ex Parte Ayers, 123 U.S. 443, at page 46, quotes the full text of the temporary restraining order which the Attorney General was cited for violating:

[&]quot;Circuit Court of the United States for the Eastern Districts of Virginia.

[&]quot;James P. Cooper, H. R. Beston, F. J. Burt, N. J. Chinnery, W. M. Chinnery, F. P. Leon, and W. G. Woolston, against

[&]quot;Morton Marye, Auditor, R. A. Ayers, Attorney General, the Treasurers of Counties, Cities and Towns in Virginia, and the Commonwealth Attorneys of Counties, Cities and Towns in said State, whose names complainants have leave to insert as they may be discovered.

"Upon reading the bill of the complainants, it is ordered that Morton

Appellee respectfully insists that the distinction between the Allen case and the Ayers case rests upon the familiar principle that when authority to act is exceeded, action by the officer beyond his authority is personal action only.

In the Allen case, payment of taxes by coupons had been tendered, and the Court regarded this tender as being equivalent to payment for the purpose of that suit. Tax collectors have no authority to distrain for taxes which have been paid. On the other hand, the authority of the Attorney General to maintain a suit in behalf of the State is not limited to those suits where the State is entitled to prevail. The opinions in both the Allen case and the Ayers case were written by Mr. Justice Matthews, and every Justice who participated in the Ayers case also participated in the earlier Allen case. This Court apparently distinguished the Ayers case from the Allen case on the basis here suggested.

⁴ The following excerpts are taken from the majority opinion of Mr. Justice Matthews In Re Ayers, 123 U. S. 443, at page 495: "It seems to be supposed in the argument, that the right of taxpayers in Virginia, who have tendered tax-receivable coupons in payment of their taxes to the proper collecting officer, to be forever thereafter free from suit by the State to recover judgment for such taxes, rests upon the

Marye, Auditor, R. A. Ayers, Attorney General, each and every treasurer of a county, city, or town in the State of Virginia, and each and every Commonwealth actorney for a county, city, or town in said State, be restrained from bringing or commencing any suit against any person who has tendered the State of Virginia's tax-receivable coupons in payment of taxes due to said State, as provided for and directed by the act of the Legislature of Virginia, approved May 12, 1887, described in the bill, and of which a copy is attached thereto, and that each and all of said parties, their agents and attorneys, be restrained from doing any act to put said statute into force and effect until the further order of the court.

[&]quot;And it is ordered that the motion for an injunction in this case be set down for hearing at the Circuit Court of the United States at Richmond, Virginia, on the first Monday in October next; provided that the Attorney General of the Stat, of Virginia, or either of the defendants, may move the court for an earlier hearing thereof after ten days' written notice to the solicitor of the complainants; and provided further, that a copy of this bill and of this order be served on the Attorney General of the State of Virginia within ten days after the filing thereof."

[&]quot;June 6, 1887."

Only Mr. Justice Harland dissented in the Ayers case, and the concluding paragraph of his dissent illuminates the basis for the distinction found by the majority. He justifies his dissent by the following language, taken from page \$16 of the decision:

proposition that such a tender is in law a payment of the taxes, so as to extinguish all claim for them on the part of the State. This proposition, indeed, is said to be justified by the authority of certain language in the opinion of this court in the case of Poindexter v. Greenhow, 114 U. S. 270. In that case the effect of a tender in payment of taxes upon the subsequent act of the collector in seizing the personal property of the tax-payer was considered and decided, but there is nothing in the opinion which countenances the idea that such a tender was a payment of the taxes, so as to extinguish all subsequent claim of the State therefor. Its effect was precisely defined in the following statement (page 299): 'His tender, as we have already seen, was quivalent to payment, so far as concerns the legality of all subsequent steps by the collector to enforce payment by distraint of his property.'"

Again, at page 500 in the Ayers case, supra, this Court said: "The grounds of this jurisdiction were stated in Allen v. B. & O. Railroad Company. The vital principle in all such cases is that the defendants, though professing to act as officers of the State, are threatening a violation of the personal or property rights of the complainant, for which they are personally and individually liable. This principle was plainly stated in the opinion of the court in Poindetxer v. Greenhow, 114 U. S. 270, as follows (page 282): 'The case then of the plaintiff below is reduced to this: He had paid the tax demanded of him by a lawful tender. The defendant had no authority of law thereafter to attempt to enforce other payment by seizing his property. In doing so he ceased to be an officer of the law, and became a private wrongdoer. It is the simple case in which the defendant, a natural private person, has unlawfully with force and arms seized, taken, and detained the personal property of another."

Again, the Court said, at page 503 of the Ayers case: "The distinction, however, is obvious. The acts alleged in the bill as threatened by the defendants, the present petitioners, are violations of the assumed contract between the State of Virginia and the complainants, only as they are considered to be the acts of the State of Virginia." (emphasis supplied)

Again, at page 504 in the Ayers case, the Court states, upon authority of Carter v. Greenhow, 114 U. S. 317:

"... that no direct action for the denial of the right secured by a contract, other than upon the contract itself, would lie under any provisions of the statutes of the United States authorizing actions to redress the deprivation, under color of state law, of any right, privilege, or immunity secured by the Constitution of the United States."

"I repeat, that the difference between a suit against officers of the State enjoining them from seizing the property of the citizens in obedience to a void statute of the State and a suit to enjoin such officers from bringing under order of the State, and in Her name, an action which, it is alleged, will result in injury to the rights of complainant, is not a defense that affects the jurisdiction of the Court, but only its exercise of jurisdiction. If the former is not a suit against the State, the latter should not be deemed of that class."

Appellant places much reliance upon Gunter v. Atlantic Coast Line Railroad, supra, upon this and upon other points for which it contends. Whatever may be the strength or weakness of the Gunter case on other points, it does not support plaintiff's contention that the action here maintained is against the individual rather than against the State. In the Gunter case the Court, to the contrary, regarded the action as one against South Carolina. The basis of the Gunter decision is made clear by language used at page 284 of the decision:

"As then, the State was not a party eo nominee in the Pegues case and as, although the suit was against officers it was not for that reason alone a suit against the State, it must follow that the ascertainment of whether the State was a party to that cause depends upon determining whether the taxing officers who were the nominal defendants were endowed by the State with the power, in a suit brought against them assailing the validity of taxes levied, to represent the State in the controversy so as to conclusively establish the rights of the State against the plaintiff if decree passed against him, and on the other hand to establish as against the State the rights of the plaintiff in that cause if decree passed in, his favor. Thus the inquiry reduces itself to this: Did the State of South Carolina become, in substance and effect; a party to the Pegues case? In other words, did the State, through the authority which it had conferred

upon the defendant officers, voluntarily submit to judicial determination the question raised in the Pegues case concerning the alleged limitation of the taxing power of the State, arising from the contract on that subject which was asserted in that case?"

We take it as elementary that a State-may, in granting its consent to be sued, provide by statute that the suit shall be nominally styled against one of its officers. Sunshine Anthragite Coal Company & Adkins, 310 U. S. 381, 402, 403. The Court concluded that the statutes of South Carolina had that effect. We shall undertake to show in a later subdivision of this brief that the State of Georgia has never consented to suit upon this subject, either by action brought against the State as such or by action brought against one of its officers in the name of such officer.

Appellant finally relies upon the Board of Liquidation v. McComb, 92 U. S. 531. In the McComb case, McComb, a bond holder, entitled under Louisiana statute to participate in a composition settlement, sought injunction against the individuals composing the Board of Liquidation to prevent their admitting to participation certain junior bond holders whose participation would reduce the value of the funds and securities held in trust for effecting the compromise. The theory of the case was that the Board of Liquidation held these funds in trust for the interested parties, and that those in the position of McComb had a property interest in the fund, and the right to demand that the trustees maintain the financial worth of the trust interest of McComb and his associates against being diminished by the admission to parficipation of bond holders who were not legally entitled to participate. The State of Louisiana had no financial interest in the controversy between the holders of one issue of bonds and the holders of the other issue of bonds. No monetary relief as to such was asked against Louisiana. The event of the judgment would not result in the payment by Louisiana of more or less money to its creditors. Hence, it was not an essential party to the controversy.

The same statutes, and bonds of the same issue as those

held by McComb, were involved in the subsequent cases of Louisiana v. Jumel and Ellioti v. Wiltz, 107 U. S. 711. Relief asked in the Jumel case was mandamus to require the several State officers named as parties defendant to "apply and pay to the extinguishment of the interest now due and payable upon the consolidated bonds of the State of Louisiana... all monies and proceeds of the tax levied or fixed by said Act (Act No. 3 of the year 1874)", then in the hands of defendants or either of them.

In Elliott v. Wiltz, supra, Elliott and others commenced this action in equity against the several officers of the State composing the Board of Liquidation.

5 Complaints prayed that:

"It may be 'ordered, adjudged, and decreed" that the act No. 3, of 1874, 'so far as your orator's interests . . . are concerned, was at all times from its passage . . . a valid and subsisting law of the State of Louisiana; that the act aforesaid, the constitutional amendment of 1874, and the several bonds and coupons of interest, held and owned by your orators as aforesaid, separately and together, constituted, were, and are; good, valid, subsisting, and binding contracts between the State aforesaid and the bearers and holders of the consolidated bonds and coupons, the obligation of which contract cannot be lawfully or constitutiofally impaired; and that, under and by virtue of such contract, your orators were and are entitled to take and enjoy all the rights, privileges, taxes, and moneys, particularly set forth and mentioned in act No. 3, and the constitutional amendment of 1874, aforesaid; that so much of the aforesaid Constitution of 1879 as alters, varies, modifies, or changes, or assumes, purpores, or attempts to alter, vary, modify, or change, the provisions of the said act of 1874, and the constitutional amendment of that year, especially article 208 of the Constitution of the year 1879, and that portion of such Constitution known and distinguished as the ordinance on State debt, do impair the obligation of the contract herein above referred to; that the said parts and portions of such Constitution are, therefore, violative of the Constitution of the United States, and are absolutely null and void, and without the slightest force or effect whatever against complainants; and afford and offer no authority or warrant for the defendants, or any one or more of them, to make such disposition or application of any part or portion of the aforesaid taxes, and the proceeds thereof, collected and to be collected. as to enable the State, therewith, to defray the expenses of the State government, or to accomplish any purpose or purposes other than those prescribed in the aforesaid funding act, and constitutional amendment of 1874; that the defendants, and each of them, may be adjudged and decreed to replace and reinstate to the credit of said interest fund any moneys or funds that may have been diverted therefrom; . . . and that In the majority opinion in Louisiana v. Jumel and Elliott v. Wiltz, supra, Chief Justice Waite discussed and distinguished Board of Liquidation v. McComb, supra; pointing out that the cases there dealt with arose under the same Act of the Legislature considered in the McComb case. A distinction between the two decisions was predicated upon the fact that in the earlier Jumel case the Board held the new issue of bonds in trust, and those who surrendered old obligations for new became beneficiaries under the trust with all the rights enjoyed by such beneficiaries. No such trust existed in Louisiana v. Jumel and Elliott v. Wiltz, supra. The Board owed no duty in respect to taxes. The Board owed no duty as trustees to do those things which the mandamus suit and suit for equitable relief sought to compel them to do.

In Cunningham v. Macon & Brunswick Railroad Company, supra, Mr. Justice Miller, in speaking for the majority, said of Davis v. Gray, 16 Wall, 203

"But it is clear that in enjoining the Governor of the State in the performance of one of his executive functions, the case (David v. Gray, supra) goes to the verge of sound doctrine, if not beyond it, and that the principle should be extended no further. ." (Bottom of page 453.)

"The case of Board of Liquidation v. McComb, 92 U.S. 531, is to the same effect..." (Top of page 454.)
"It is believed that this is a far as this court has gone in granting relief in this class of cases..." (Bottom of page 454).

said defendants, and each and every one of them, may be preemptorily enjoined and restrained from recongizing as valid, against your orators, Art. 208 of the Constitution of Louisiana, and the 'Debt Ordinance,' and 'from ignoring the Funding Act and constitutional amendment of 1874, and from doing, and causing to be done, any act or thing whatsoever obstructing, preventing, or impeding, or tending, directly or indirectly, to obstruct, prevent, or impede, in the slightest degree, the prompt, full, and complete execution and enforcement of the act and constitutional amendment aforesaid, and, finally, that the said defendants, and each and every one of them, may be enjoined and restrained to such other and further extent, and in such additional way and manner, as the court may deem right and proper."

"On the other hand, in the cases of Louisiana v. Jumel and Elliott v. Wiltz, 107 U. S. 711, decided at the last terms very ably argued and very fully considered, the Court declined to go any further. . ." (Page 455.)
"We think the foregoing cases mark with reasonable precision the limit of the power of the courts in cases affecting the rights of the State or federal governments in suits to which they are not voluntary parties." (Middle of page 456.)

There is a remarkable similarity between the relief sought in the case of Elliott v. Wiltz 5 and the relief granted in Georgia Raifroad & Banking Company v. Wright, supra. The majority opinion in Elliott v. Wiltz concludes with the following language:

When a State submits itself without reservation to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has, by its act of submission, allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose, but this is very far from authorizing the courts, when a State can not be sued, to set up its jurisdiction over the officers in charge of the public monies so as to restrict them against the political power on their administration of the finances of the State. In our opinion, to grant the relief asked for in either of these cases would be to exercise such a power."

If judicial power did not extend to the grant of the relief prayed in the Wiltz case, it should not be exercised to supplement and enforce the judgment in the Wright case which purported to grant substantially similar relief.

Appellant likewise takes comfort in the fact that this Court has in many cases affrmed injunctions against State officials enjoining them from collecting taxes from railroad companies on the grounds that such action would impair a contract of exemption entered into by the State.

In none of the several cases which he cites did the opinion of the Court deal with the question of sovereign immunity from suit and, from all that appears from the decisions, the

question was not presented.

While nothing in the opinion in Humprey v. Peques, 16 Wall. 244, discloses the fact, Appellee insists that the statutes of the State there involved, namely, South Carolina, in effect waive sovereign immunity. The subsequent decision of this Court in Gunter v. Atlantic Coast Line, supra, so held.

b. When considered as ancillary to the Wright case; the case at bar is, in effect, against the State.

Appellee takes the position that the judgment rendered in the Wright case was, in substance and effect, against the State, however, not being formally made a party and not having consented to be bound by the judgment, May not have its rights prejudiced simply because its officer, when sued as an individual wrongdoer, failed to question the Court's jurisdiction to render a judgment operating upon the interests of the State. Just as the District Court said in its opinion, Georgia Railroad & Banking Co. v. Redwine, 85 F. Supp. 749, 754:

"The question is, therefore, open and being now asserted in bar of the present proceeding, it must be sustained."

The decree of the Circuit Court in the Wright case which Appellant avowedly here seeks to implement and enforce (R.1, Par. 4 of Complaint and R. 9, Par. 3 of Prayer) purported to render declaratory relief. In part that decree provided:

"Considered, ordered and adjudged by the Court that the Charter of the complainant, to-wit the Act of the Legislature of Georgia of December 21, 1833, and various other Acts of said Legislature passed prior to the first day of January, 1863, is a valid and binding contract between the State of Georgia and the complainant, the Georgia Railroad & Banking Company:

".... The said Charter provides a system of taxation for said property exclusive of all other taxation, to-wit: one-half of one percent of the net earnings of said property."

The interest of the State of Georgia in the issues thus adjudged can hardly be questioned, and it is just as indispensable a party to the grant of declaratory relief adjudging that a valid contract exists to which it is a party and determining the duties and obligations under this contract, as it would be to a sait on that contract to compel its specific performance. Musgrove v. Georgia Railroad & Banking Company, supra.

This Court, in marginal note 9 to Larson v. Foreign and Domestic Commerce Corporation, 337 U. S. 682, at page 689, clearly pointed out the lack of judicial power to render this type of declaratory relief against a non-consenting State. There it was said:

"The complainant also asks for declaratory relief even more clearly directed at the sovereign. It was asked that this court declare that 'the sale of this coal... is still valid and in effect.' The administrator, an agent for a disclosed principal, was not a party to the contract of sale. See 2 Restatement, Agency (1933) Section 320. The request for an adjudication of the validity of the sale was thus, even in form, a request for an adjudication against the sovereign. Such a declaration of the rights of respondent vis-a-vis the United States would clearly have been beyond the court's jurisdiction. See Stanley v. Schwalby, (1869,) 162 U.S. 255. We do not rest our conclusion here on the request for such a declaration, since the District Court could have granted only the injunctive relief requested."

Clearly, that part of the judgment in the Wright case which Appellant now seeks to implement and enforce is the portion which purports to be declaratory of the contractual rights of Georgia Railroad & Banking Company vis-a-vis the State of Georgia.

c. No action of the Comptroller General, the Governor, or the Attorney General in connection with the Wright case constituted consent of Georgia to be sued a bound by the judgment in the Wright case.

All of these officers were without authority to consent for Georgia.

Counsel for appellant flatly states that a State may not participate in litigation and take its chances of winning, and then later take the position that it was not bound on account of the 11th Amendment. It is their view that the defense by the Attorney General of the suit of Georgia Railroad & Banking Company v. Wright in the Circuit Court constituted such State participation. In support of this contention they rely upon Gunter v. Atlantic Coast Line, supra, Gardner v. New Jersey, 329 U. S. 565, and Clark v. Barnard, 108 U. S. 436. This reliance is misplaced.

The Gardner and the Clark cases were both concerned with an assertion on behalf of the states involved of a claim upon a fund in Court. As Mr. Justice Douglas has tersely stated in the Gardner case:

"If the claimant (to a part of the fund in court) is a State, the procedure of proof and allowance is not transmuted into a suit against the State because the Court entertains objection to the claim."

New Jersey in the Gardner case, and South Carolina in the Clark case, had each become actors. They were asserting claims, not having claims asserted against them.

The Gunter case, as we shall hereinafter undertake to show, did not turn upon participation, considered apart from statutory authority and direction to participate, as constituting a waiver, but turned rather upon the fact that by legislative action suit, in substance against the State had been authorized by an action nominally taken against one of the officers of the State. The Attorney General's participation was pertinent only as showing a contemporaneous administrative interpretation of the meaning and extent of his statutory authority.

In State of Missouri v. Fiske, 290 U. S. 18, this Court dealt with the same contention that is here made by appellant, and readily struck it down. There Missouri had intervened as

a party-defendant in a pending suit in the District Court, asking that certain shares of stock in the hands of that Court's trustee be not disturbed until an adjudication of ownership be made in a pending suit in the Court of Probate of that State. One of the original parties promptly filed an ancillary bill seeking to have the Court determine the stock ownership as between the State of Missouri and other claimants. The Court concluded that the intervention was too limited in character to constitute a waiver of the immunity given by the 11th Amendment. The fact that that suit was ancillary and supplemental to one in which the Court had admitted jurisdiction of the original parties and a limited jurisdiction of Missouri gave the case no better standing as against a claim of immunity under the 11th Amendment. Nor did the fact that the suit was there in rem furnish ground for the issue of a process against a non-consenting State.

Carr v. United States, 98 U. S. 433, is on all fours with the case at bar upon this point. There, in ejectment brought against one who held title as an agent of the United States and whose possession was only for the purpose of asserting its claim of title and right of possession, the District Attorney and other counsel employed and directed by the Secretary of Treasury appeared in defending. In a subsequent action, this Court said that their participation was legally insufficient to preclude the United States by the judgment. With regard to the action of the Secretary of the Treasury, the Court said:

"He may have deemed it prudent to assist the officers who were sued without intending to waive any of the rights of the government."

The record in the case at bar justifies a similar statement with regard to the action of the Governor in directing the defense of Wright's case, if he did so in fact direct its defense, and the action of the Attorney General in appearing as counsel for that defendant. It might also be as truly said of the power of the Governor, Comptroller-General, and Attorney General, as was said in the Carr case of the power of the Secretary of

the Treasury and the District Attorney, "and in fact (they), had no authority to waive those rights."

The judgment in the Wright case, if it had any validity, was binding only upon Wright, as an individual. The judgment did not and could not bind the State of Georgia because the State's immunity from such a ruit had not been relinquished by the Georgia Legislature, the only authority capable of waiving or relinquishing such immunity.

Appellant states that the Wright case was defended by the Attorney General of Georgia, with the approval and direction of the Governor. The record does not disclose such approval or direction. However, even if there was such a direction, it could not operate to waive State immunity; only the Legislature has that authority.

In Western Union Telegraph Company v. Western and Atlantic Railroad Company, 142 Ga. 532, the Supreme Court of Georgia stated at page 535:. "The State cannot be sued or subjected to an action of any kind, without special legislative authority."

Again, in Roberts v. Barwick, 187 Ga. 691, at page 696, the Court quotes with approval from the decision in Atlantic and Western Railroad v. Carlton, 28 Ga. 180 (2), as follows: "In such cases in England, the King is petitioned in his court of chancery, and the chancellor administers right as a matter of grace, not by compulsion. Here the usual course pursued by the citizens has been to petition the legislature; and that has been the resort when no other remedy has been provided."

And in Cannon v. Montgomery, 184, Ga. 588, at page 591, the Court states: "A suit can not be maintained against the State without its statutory consent."

Appellant does not contend that any statute effected a waiver of sovereign immunity so as to make the former suit

against Wright a suit against the State of Georgia. Appellant does, however, contend that the participation of the Attorney General in the Wright case effects a waiver of immunity. A short answer to this contention is, again, there is no statute authorizing the Attorney General to waive sovereign immunity. It has been held that the Attorney General has only those powers specifically given him by statute, and he has no authority to perform any act not authorized by statute. Walker v. Georgia Railroad & Power Co., 146 Ga. 655, at page 656.

Administrative interpretation placed upon the statutory authority of the Attorney General has been that he has no authority to waive the State's immunity from suit. M. J. Yeomans, then Attorney General of Georgia, in an address on the History, Powers and Duties of the Attorney General, reported in the 54th Annual Session of the Georgia Bar Association Proceedings of 1937, at page 245, listed among the acts which the Attorney General of the State might not perform, the following: "He cannot consent for the State to be sued". The Attorney General has no such authority. Neither has any other State officer. A consent on the part of the State to be sued must be found in some legislative enactment."

In the absence of statutory waiver of State immunity from suit affecting the Wright case, and in the complete absence of authorization to Wright, the Attorney General, or the Governor to waive statutory immunity and permit a final adjudication of the issue in controversy, it is clear that the Wright case was not and is not binding upon the State of Georgia.

Appellant contends that the Georgia statutes providing that it is the duty of the Attorney General to represent the State in all civil and criminal cases in any court when required by the Governor constitute statutory authority and waiver of State immunity.

As it happens, a State statute almost exactly identical to the Georgia statute has been considered by this Court on the exact point raised by Appellant. In Ford Motor Company v. Department of Treasury, 323 U.S. 459, at pages 466, 468, this Court considered the Indiana statute which provides:

"It shall be the duty of the attorney-general to represent the department, and/or the state of Indiana, in all legal matters or litigation, either criminal or civil, relating to the enforcement, construction, application and administration of this act, upon the order and under the direction of the department."

The Court said:

"Nor do we think that any of the general or special powers conferred by statute on the Indiana attorney general to appear and defend actions brought against the state or its officials can be deemed to confer on that officer power to consent to suit against the state in courts when the state has not consented to be sued. State court decisions construe strictly the statutory powers conferred on the Indiana state attorney general and hold that he exercises only those powers 'delegated' to him by statute and does not possess the powers of an attorney general at 'common law.' It would seem, therefore, that no properly authorized executive or administrative officer of the State has waived the state's immunity to suit in the federal courts."

It should be noted that the Indiana State Court decision holding that the Attorney General has only those powers specifically given him by statute has its exact counterpart in the Georgia State decision concerning the Georgia Attorney Gent

eral's powers, in Walker v. Georgia Railroad & Power Co., 146 Ga. 655, at page 656.

Finally, the contention that the Attorney General's appearance in the Wright case did not waive State immunity from suit is supported by Stanley v. Schwalby, 162 U.S. 255, where this Court held that the fact that a United States Attorney had filed an answer to a suit under instructions by the Attorney General did not bind the United States, nor waive its immunity.

It should be noted that the Governor has the power to provide for the defense of individuals, where the State has an interest. Clearly this cannot constitute a waiver of immunity.

As authority for the proposition that the appearance of the Attorney General on behalf of the State makes the State in effect a party to the action, Appellant cites Mayo v. Renfroe, 66 Ga. 408; Hart v. Atlanta Terminal Company, 128 Ga. 754; and, Trust Company of Georgia v. Georgia, 109 Ga. 736.

References made in the Mayo case, supra, to the effect of the Attorney General's appearance are clearly make-weight, the Court ruling in that case that the Governor was neither a proper nor necessary party-defendant to an equitable action brought against a Sheriff to prevent levy of an execution issued by the Governor. The point was also made that the venue of this equitable action was improperly laid in the county of the Sheriff's residence, the Governor being the only person against whom substantial equitable relief was prayed. The true meaning of the holding in the Mayo case upon this point is stated by the Supreme Court of Georgia in Railroad Commission v. Palmer, 124 Ga. 633, where the Court, at page 647, said:

"In each of the cases of Wright v. Southwestern Railroad' Company, 64 Ga. 794, and Mayo v. Renfroe, 66 Ga. 408, the State was a substantial party in whose behalff the execution was proceeding; and as it could not be sued, and therefore the venue could not be fixed with regard to it, it was held that a bill to enjoin the levy could be brought in the County of the residence of the Sheriff who was proceeding to act."

In the Mayo case, the State's sovereign immunity from suit was not made an issue.

In the Hart and Trust Company rases, the State was a party-plaintiff and in each case the defendant raised questions as to whether or not the pleadings properly made the State a party-plaintiff. The right of the State to appear as a plaintiff does not carry with it a relinquishment of the State's immunity. The sovereign has the right to sue without being sued in all cases except those in which the legislature has relinquished the State's immunity.

Nothing ruled by this Court in Gunter v. Atlantic Coastline, 200 U. S. 273, requires a reversal of the District Court judgment. When the prior case which controlled the decision in the Gunter case, Humphrey v. Pegues, 16 Wall, 244, arose, the pertinent statute in South Carolina was that adopted in 1868 as amended in 1870 (14 S.C. Stat. 65). Insofar as here material, this Act did four things:

- (1) It gave to County Treasurers and Auditors certain duties with respect to State taxes, thereby constituting them in part State officers. (Page 279).6
- (2) It provided that where any action is prosecuted against one of these officials for performing or attempting to perform any duty under the Act, the same shall be defended by the Attorney General "for and on behalf of the State" if the State be interested in the revenue in said action. (Page 286).6

⁶ Page references are to the decision of this Court in Gunter v. Atlantic Coastline.

- (3) It made counties liable for counsel fees and any damages which might be awarded against officials for their efforts to enforce the provisions of that Act. (Page 286).6
- (4) In 1870, the Act of 1868 was amended to provide that any judgment recovered against the collecting officers for recovery of money illegally collected as taxes should be paid by the County and the State to the extent of their respective interests. (Page 287).6

It was in this state of affairs that the Pegues case was instituted and the defense of the State officers made by the Attorney General.

In waiving sovereign immunity from suit, it is by no means unusual for the State or Federal Government to provide that the action shall be brought against one of its officers in his official capacity. Such was the case in the statute with which this Court was concerned in Sunshine Anthracite Coal Company v. Atkins, 310 U. S. 381. The Emergency Court of Appeals was concerned with a similar statute in Safeway Stores v. Porter, 154 F. 2d, 656, to refer but to those cases which Appellant has cited.

As this Court pointed out in Chicago, Rock Island & Pacific v. Schendel, 270 U. S. 611:

"Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different . . . and parties different may be, in legal effect, the same."

With these considerations in mind, it is abundantly clear that when this Court said at page 286 in the Gunter case:

"We see no escape from the conclusion that the provision last quoted, where suit was brought concerning. State taxes made a County Treasurer, who was the State Tax Collector, an agent for the state and empowered him for and on behalf of the State to defend the suit and required him, in order fully to protect the interests of

the State, to be represented by the highest law officer of the State, the Attorney General.",

it was, in effect, saying that the State had consented to be sued through the persons of its County Treasurers, and that this consent was legislatively given by the Act of 1868 and the Amendment of 1870.

If we are correct in concluding that the Gunter case, supra, and its predecessor the Pegues case, supra, were authorized, as suits against the State with its consent, then certainly it affords Appellant little support for the proposition that this ancillary relief may be granted against the present State Revenue Commissioner, although the prior action be considered only as a suit against Wright, the individual wrongdoer, acting beyond his lawful authority.

d. Georgia did not, by inaction or acquiescence in the decision rendered in the Wright case, become estopped from raising the issue of sovereign immunity in the present case.

Appellant devotes a portion of his brief to showing that in 1968 a Governor who was not in office at the time the Wright case was instituted or decided by the District Court, in a message to the Legislature, spoke as though he regarded the Wright case as one to which the State of Georgia was a party. Appellant also apparently considers significant a resolution of the Georgia Legislature passed in 1913 referring to a then existing contract with John C. Hart to represent the interests of the State in suits for taxes against several railroad corporations. The John C. Hart referred to in this resolution is the same person who was Attorney General of Georgia during the period when the Wright case was making its way through the courts. He was no longer Attorney General when the resolution was passed. It is true that for a number of years prior to 1945 no effort was made by Georgia to tax the Georgia Railroad and Banking Company other than as provided in its charter. Appellee insists that inaction by the State, standing alone, will not create an estoppel. To paraphrase the language of District Judge Russell in the District Court decision in this case, such a rule of estoppel would permit unauthorized officers to fritter away this essential attribute of sovereignty, notwithstanding the fact that they had no authority to waive it. Although the Gunter case makes reference to official inaction over a period of years, this inaction is given weight only as an administrative interpretation of the meaning of their statutes, which, in Appellee's view, granted consent to sue. There are no such statutes in Georgia which may be so administratively interpreted, and indeed we do not understand the Appellant to contend that inaction represented an administrative interpretation of the Attorney General's statutory authority.

e. The judgment in the Wright case did not and does not bar the State of Georgia because it had not consented to be bound thereby.

Since Georgia was not a formal party to the suit and since, as we have undertaken to show, it did not consent to be sued through its officer, it follows that the judgment rendered in the Wright case had no binding effect upon Georgia. This rests upon the fundamental principle of law that persons not parties or in privity with the parties or represented by parties are never precluded by a judgment. This principle is clearly recognized in Gunter v. Atlantic Coast Line, supra, and it was for that reason that it became necessary there to determine whether South Carolina had consented. It was likewise the controlling principle in Carr v. United States, supra, and in Tindall v. Wesley, 167 U. S. 204, and in Hussey v. United States, 222 U. S. 88. It was suggested in United States v. Lee, 106 U. S. 196, 217, that judgment against the agents of the Government would estop the Government, but this Court pointed out that this result would not follow. Indeed, we may r say here, as the Court said in Sunshine Anthracite Coal Co. v. Atkins, supra:

> "The crucial point is whether or not in the earlier litigation the representative of the United States had authority

to represent its interest in a final adjudication of the issues in controversy."

To the same effect are Sage v. United States, 250 U. S. 33, Bankers Pocahontas Coal Company v. Bennett, 287 U. S. 308, and Stone v. Interstate Natural Gas Company, 103 F. 2d, 544, affirmed 308 U. S. 522.

f. Appellee, who is Georgia's present Revenue Commissioner, did not become estopped from raising the issue that a suit nominally against him is, in effect, a forbidden suit against the State.

Appellee concedes that, where legislation relinquishes sovereign immunity from suit by designating an officer of the sovereign and authorizing suit against him, judgment upon such a suit binds the State and his successors in office. Sunshine Anthracite Coal Company v. Atkins, supra. However, in the absence of a statutory consent to be sued, a judgment against such an officer is necessarily personal, and this personal judgment neither binds the sovereign nor his successors in office. Stone v. Interstate Natural. Gas Company, (C.C.A. 5th), 403 F. 2d, 544, aff'd, 308 U. S. 522. Here again, the crucial point is whether the representative of the Government had authority to represent his sovereign in a final adjudication of the issue. The Comptroller-General had no such authority. in the Wright case to represent Georgia in a final adjudication of its rights. Any action on the part of the Comptroller-General in that case purporting or attempting to waive Georgia's sovereign immunity was ultra vires. Ford Motor Company v. Department of the Treasury, supra, is precisely in point upon this question. It was pointed out in the opinion that respondents conceded that the actions of the administrative and executive officers of Indiana waived the State's immunity if it be within their power so to waive. No one but Wright was effected by a participation in the Wright case. This rule is clearly stated in Stone v. Interstate Natural Gas Company, supra, in which Stone, the State Commissioner of Franchise . of Mississippi, forced the Gas Company to pay certain taxes. The Gas Company defended by contending that its immunity

from tax had been established by a former decree of the United States District Court enjoining other officers from collecting under a similar statute.

The language of Circuit Judge Sibley, who spoke for the Court in this case, is so appropriate to the case at Bar that we quote therefrom as follows:

"We conclude also that the judgment in the three-judge case of Dec. 4, 1931, is no estoppel. It does not appear to be between the same parties. The Gas Company is plaintiff in both suits but Stone, the present defendant who is sought to be bound by the former judgment, was not a party to it. This suit against him is a personal suit and the judgment rendered is a personal judgment. Execution on it would run against him The reference to Rim as Commissioner is descriptio personae. Smietanka, Collector v. Indiana Sieel Co., 257 U. S. 1, 42 S. Ct. 1, 66 L. ed. 99. The three-judge suit was against other individuals, who though officers were enjoined from what they were about to do on the ground that the law of their office did not justify them. The State of Mississippi for whom they tried to act was not a party, though her Attorney General was among those sued. She could not under the Eleventh Amendment, U.S. Const.; have, been sued. How officers who act for their government under an unconstitutional authority may be sued, and yet their governments not be bound by the judgment, is fully explained in United States v. Lee, 106 U.S. 196, 222, 1 S. Ct. 240, 27 L. ed. 171. See also Sage v. United States, 250 U. Sr 33, 39 S. Ct. 415, 63 L. ed. 828; Hussey. v. Crane (United States), 222 U. S. 88, 93, 32 S. Ct. 33, 56 L. ed. 106; Carr v. Umied States, 98 U. S. 433; 25 L. ed. 209; Stanley v. Schwalby, 162 U. S. 255, 16 S. Ct. 754 50 L. ed. 960. Stone can now justify his collection of these taxes as fully as the State of Mississippi could do if she were now sued; and as she is not bound by the former judgment against her officers, he is not." (Emphasis supplied).

From brief of counsel, we understand Appellant to take the position that, even though the suit against Wright be construed as against him in his individual capacity seeking to justify his action under an unconstitutional enactment, there is, nevertheless, sufficient privity between him and a subsequest officer so as to conclude him by the carlier judgment against Wright. The authorities on which counsel relies, however, do not support this position nor do they in anywise conflict with the holding in the Stone case, supra.

The first of these is New Orleans v. Citizens Bank, 167 U. S. 371, which, it is true, held that subsequent office-holders were bound by a judgment nominally against their predecessors, but, in speaking of the earlier case, this Court said, at the bottom of page 388:

"The first contention, based upon the mere change in the person holding the particular office, is without merit. It is not denied that the Tax Collectors and Board of Assessors who stood in judgment in the suit when the decisions were rendered were duly qualified and empowered to that end. And it is not gainsaid that the successors in office of those officers who are defenders here are also duly empowered." (emphasis supplied).

In Tait v. Western Maryland Railway Co., 289 U.S. 620, the Court, while holding that judgment in a suit against the Commissioner of Internal Revenue is conclusive in a later suit upon the same issue against the United States and Collector of Internal Revenue said "since the Commissioner acted in the earlier suit in his official capacity as representative of the Government." (Page 626). In passing, however, the Court makes reference to the fact that judgment in a suit against the Collector is not conclusive upon a later suit against the United States or against the Commissioner for the reason that "in a suit for unlawful collection, the liability of a collector is not official, but prsonal." Sage v. United States, 250 U.S. 33; Smietanka v. Indiana Steel Company, 257 U.S. 420

Sunshine Anthracite Coal Co. v. Atkins, 310 U. S. 381, may also be distinguished because the judment there held to be res judicata was one rendered upon petition for review under Section 6 (B) of the Bituminous Coal Act of 1937, 15 U.S.C.A. Sec. 836 (b), in which the United States had, in effect, given its consent to be sued. The crucial issue here is, we say, just as this Court said in the Atkins case (page 403), whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy."

Safeway Stores v. Porter, 154 F. 2d, 656, and United States v. Willard Tablet Co., 141 F. 2d, 141, may be laid to one side for the same reason.

Appellant insists that to establish a rule contrary to that for which it contends would be against public policy, and would permit the State continually to relitigate, the question of tax liability for a single year in successive trials. This is not so on Appellant's own argument in the case at Bar. As it has pointed out, an opportunity to question taxability is guaranteed to it by the Fourteenth Amendment. A successful defense on this issue in the manner provided would, of course, be conclusive upon the State. The infirmities which he points out in judgments obtained against officers as individual wrongdoers acting beyond their authority is inherent in the nature of the suits and in the nature of the sovereign immunity guaranteed by the Eleventh Amendment.

II.

The District Court's judgment of dismissal was proper, for the reason that Georgia provides plain, speedy and efficient remedies for determining Appellant's liability to tax.

a. Appellant may appeal from an adverse decision of the Revenue Commissioner upon the question of taxability.

An administrative procedure is provided for determining all questions of taxability and valuation which are initially for decision by the State Revenue Commissioner. (Administration of Taxing Laws Act, approved January 3, 1938, Georgia Laws 1397-38 Ex. Sess., page 77; Georgia Code Ann. (Cum. Pkt. Pt.) Chap. 92-84). This procedure allows written protest by any taxpayer within thirty days after the making of any additional assessment by the Revenue Commissioner, and provides for notice to the taxpayer together with hearing and conference on such protest, and for determination of the issues thus made in that manner, which, final determinations are declared to be "subject to the right of appeal as declared in this Act." (Sections 30 and 31 of that Act. (App. 64), Georgia Code Ann. (Cum Pkt. Pt.), Sections 92-8432 and 92-8433).

From 1938 to 1943 the method of appeal provided by that Act was first to a Board of Tax Appeals created by the same Act, with right of full review by direct appeal to an appropriate superior court. Provisions for appeal to the superior court were incorporated in Section 45 of the Act in question (App. 65), Georgia Code Ann. (Cum. Pkt. Pt.), Sections 92-8446.

By Act adopted February 17, 1943, Georgia Laws 1943, page 205, the Board of Tax Appeals was abolished and provision made for review by direct appeal to the superior court in the manner provided by Code Section 92-8446. This review extended to "all matters, cases, claims and controversies arising in the administration of the revenue laws or in the exercise of the jurisdiction of the State Revenue Commissioner," except as otherwise in that Act provided. (App. 66). By the terms of the same 1943 amendment, an exception was made "with reference to reviewing assessments of the State Revenue Commissioner... for ad valorem taxation against" certain classes of taxpayers, which include this Appellant.

The Amendatory Act of 1943 then goes on to provide a method of arbitration of valuation, and to provide that the decision of the arbitrators shall be subject to appeal and judicial review identical with that provided for reviewable decisions of the Revenue Commissioner.

Appellant insists that Section 19 of the amended Act took

away the right to judicial review of the Administrator's decision, both on questions of taxability and valuation, and that it provided for submission to the arbitrators only the question of valuation, providing no review on the question of taxability. Appellee insists that Section 18 of the amended Act is limited by Section 19 only to the extent that the latter Section provides an alternative procedure, and that the determination of taxability is not one of the decisions of the Commissioner excluded from the general review provisions of Section 18 because it is not included within the meaning of the phrase "assessment for ad valorem taxation," as that expression is used in Section 19 of the amended Act. Appellee further insists that Section 19 of the amended Act should be read in the light of former provisions relating to assessment and arbitration, codified as Sections 92-6001 and 92-6002 (App. 59), which were declared by the 1943 amendment to the Administration of Taxing Laws Act to be of continued force, as modified. Clearly, these Sections relate only to a determination of value.

Similar provisions with reference to the arbitration of assessments for county taxes, Georgia Code 1933, Sections 92-6910, 92-6911 and 92-6913 (App. 60), have been held by the Supreme Court of Georgia not to include a determination of taxability. Columbus Mutual Life Insurance Company v. Gullatt, 189 Ga. 747, 754. In the course of this decision, that Court said, after reviewing certain measures adopted over a period of years for the purpose of allowing taxpayers to be heard on a question of valuation and taxability:

"It will thus be seen that while there have been exceptions in one or two instances from the general rule of determining valuation by arbitration, in no instance has the Legislature departed from the policy of permitting contests of taxability to be determined by the superior courts, . . . We hold that the method of contesting the taxability of the property in question is by petition in equity in the superior court."

Thus, it seems clear that the expression dassessment for

ad valorem taxation," as used in Section 19 of the Act means only a determination of the value of the property, and that all other questions are left open for judicial review by appeal in the usual manner. Indeed, the terms of Section 45 of the Act of 1937, which were in no way expressly changed by the Act of 1943, are consistent only with this interpretation, as they make express provision for the venue in case of appeals by railroads on appealable decisions made by the Revenue Commissioner.

b. Appellant may pay taxes assessed on behalf of the State and sue the State, with its consent, for a refund.

Appellant does not deny that the remedy by payment and suit for refund is available with regard to tax assessed on behalf of the State. It is pointed out, however, that there is no provision of law for making refund of taxes paid to counties and other subordinate taxing units. Appellee does not question this latter position. The issue could be clearly presented with respect to the State by paying only the tax assessed in behalf of the State. Other remedies are available to test liability with regard to taxes assessed on behalf of counties and cities. There is no reason to assume, in the present state of the record, that Appellant would be forced to a multiplicity of remedies once the issue has been properly made in a suit to which the State is a party with its consent. We submit that the probability is that counties and municipalities will voluntarily defer action and abide by the event of a suit to which the State is properly a party, rather than rush precipitately into expensive and difficult litigation. Should this forecast prove erroneous, there will still remain time and opportunity to invoke the aid of an appropriate court having equitable jurisdiction. In any event, Appellant should, by all means, exhaust the administrative remedies of protest and hearing available to it before seeking judicial relief.

c. Appellant may arrest tax executions by affidavits of illegality.

The Act of February 28, 1874, Georgia Laws 1874, page

107, now codified as Sections 92-2602, 92-2603 and 92-2604, Georgia Code 1933 (App. 57), provided that the question of tax liability could be raised on an assessment against a railroad company for ad valorem tax by affidavit of illegality. The Supreme Court of Georgia held in Goldsmith v. Georgia Railroad, 62 Ga. 485, that the remedy thus provided was available only to those who made a timely tax return in accordance with that Act.

By Act approved August 28, 1931, known as the Reorganization Act, Georgia Laws 1931, page 7 (App. 63), now codified as Section 92-7301 of the Georgia Code of 1933, the right to employ affidavit of illegality is accorded to every taxpayer for the purpose of determining whether or not the tax is legally due, whether the right to such a remedy is allowed in the Act imposing the tax or not. The rights accorded by this Act were not conditioned upon making a timely tax return and, while the precise question has never. been presented to or decided by the Supreme Court of Georgia, Appellant insists that its use is not so limited. This Act, or the portion of it here material, has never been expressly repealed. Certainly it was not expressly repealed by the Tax Administration Act of January 3, 1938, Georgia Laws Ex. Sess., 1937-38, page 77 (App. 64), and the only limitation which this Act imposed upon the use of this remedy is contained in Section 44 of that Act, wherein it is provided:

"No trial court shall have jurisdiction of proceedings to question such assessments except as in this Act provided."

This limitation upon jurisdiction was removed by the Act of February 17, 1943, which expressly amended the Act of January 3, 1938, including in Section 18 the following:

"Provided, however, that nothing herein contained, and no provision of this Act, shall be construed to deprive a taxpayer against whom an execution for taxes has been issued under an assessment by the State Revenue Commissioner, of the right to resist enforcement of the same by affidavit of illegality."

Appellee insists that the effect of this Amendment of 1943 was to remove the bar to the exercise of jurisdiction imposed upon the courts by the earlier enactment and to make available the already existing remedy of affidavit of illegality.

Since the passage of the Act of 1943, the trial and appellate courts have exercised jurisdiction of issues made by the filing of affidavits of illegality. Twentieth Century-Fox Film Corporation v. Phillips (1948) 76 Ga. App. 825. And, indeed, appear to have entertained issues made by such affidavits of illegality between 1938 and 1943. Department of Revenue v. Boykin, 67 Ga. App. 289. Department of Revenue v. Stewart, 67 Ga. App. 281; and in the last named case, discussed the nature of the procedure to be followed in tax cases and pointed out the respects in which these procedures differed from procedures on common law executions, but made no suggestion that the Court might be without jurisdiction of the subject matter.

Appellant does not appear to take the position that this remedy was repealed with respect to taxes assessed on behalf of counties and municipalities. He contends, however, that the various taxing political subdivisions have an aggregate of 310 tax claims against the Georgia Railroad & Banking Company and, assuming that each would be separately levied by the sheriff states that 310 affidavits of illegality would be required. Under this statutory procedure, no affidavit of illegality lies until there has been a seizure of property thereunder.⁷

The proceeds of the sale of property by a sheriff may, of course, be applied to the settlement of all executions in his hands, as well as that under which seizure was made. Newton v. Nunnally, 4 Ga. 356. Lowe v. Moore. 8 Ga. 194.

⁷Ga. Code 1933, Section 39-1003: "No affidavit of illegality shall be received by any Sheriff or other executing officer until a levy shall have been made."

The latter course is obviously the more practical and efficient from the point of view of the collecting officer. To assume that the taxing authorities would do otherwise imputes to them a course of action more calculated to harrass and annoy than efficiently to enforce. No facts in the record warrant such an inference.

d. Appellant may, if other remedies are inadequate, sue the State, with its consent, in the Superior Court of Fulton County.

This Court held in Central of Georgia Railway Company v. Wright, 207 U. S. 128, that due process of law required some opportunity to test the taxability of property, and if no such opportunity was afforded by statute then equity would afford relief. The Supreme Court of Georgia had, in effect, so held a number of years prior to the cited decision of this Court in the case of Wright v. Southwestern Railroad Company, 64 Ga. 783, and in Goldsmith v. Georgia Railroad Company, 62 Ga. 485. Again in 1906, in City of Atlanta v. Jacobs, 125 Ga. 523, that Court reiterated this rule. In 1918 it was codified in the following language:

"Section 92-6104. If the delinquent under section 92-6102 disputes the taxability of such property he may raise the question by petition in equity in the Superior Court of Fulton County, and if such delinquent is dead, his personal representative or representatives shall have the same right."

Appellant contends that it is within the meaning of the term "delinquent" as used in that Section which applied to those persons required to make property tax returns to the then Comptroller-General, now State Revenue Commissioner, and who failed to make such returns within the time required by the statute. Appellant insists that this statute has been repealed by the subsequent enactment of the Administration of the Taxing Laws Act, supra, which purported to limit the jurisdiction of trial courts.

Appellee contends upon this point that the rule was not exclusively of legislative origin, and that the subsequent

legislation mentioned did not accompany its repeal. Indeed, if, as Appellant insists, there is no other adequate remedy for testing the issue of taxability, then the constitutional reasons which gave rise, in advance of codification, to the statute would continue to make it available as a remedy.

III.

The District Court did not err in failing to grant summary judgment for Appellant as prayed.

a. The legislature was without constitutional authority to bind Georgia by contract perpetually alienating a portion of the sovereignty of the State.

Legislative authority, or the want of such authority, at the time Georgia Railroad & Banking Company was chartered is to be determined from Georgia's Constitution of 1798. To fully appreciate the meaning of certain of its language, certain incidents in Georgia history should be recalled.

On January 7, 1795, the Legislature enacted the most celebrated statute in Georgia history, the "Yazoo Act." Watkins Digest, 387. Under the misleading title, "An Act to supplement an Act for appropriating a part of the unlocated territory for the payment of the late State troops and for other purposes therein mentioned; declaring the right of this State to the unappropriated territory thereof, for the protection of the frontiers, and for other purposes.", most of what is now Alabama and Mississippi was sold to four land companies for the paltry sum of \$500,000.00. When this action became generally known, public wrath and indignation, in large part directed at a careless and inattentive Legislature, rose to high pitch. On February 13, 1769, the so-called Rescinding Act was adopted. Princes' Digest, 515. In seeking to rescind and renounce the Yazoo Act as a fraud and as constitutionally void, the Rescinding Act stated in its preamble certain constitutional principles, including the following on the nature and limitation of legislative power:

"... The free citizens of the State or, in other words, the community thereof, are essentially the source of the

sovereignty of the State, and no individual or body of men can be entitled to or vested with any authority which is not expressly derived from that source, and the exercise or assumption of powers not so derived become themselves oppression and usurpation."

The sale was then branded as "operating as a dereliction of jurisdictional rights, and a virtual dismemberment of the State."

McElreath, in his treatise on the Constitution of Georgia. page 92, Section 75 (1912), states of the constitutional principles announced in the Rescinding Act, that:

"In this reasoning the Legislature was grasping at a constitutional principle inhering in natural right not fully grasped and expressed in the organic law of the State until it was embodied in the Constitution of 1877; that 'the right of taxation is a sovereign right, inalienable, indispensable'; is the life of the State, and rightfully belongs to the people in Republican governments, and neither the General Assembly nor any or all Departments of the Government established by this Constitution shall ever have the authority to irrevocably give, grant, limit, or restrain this right..."

Constitutional delegates were elected at the general election in 1797. The Constitutional convention assembled in May, 1798, and from their hands came the document which became the Constitution of 1798.

Thus it was the influence of the Yazoo Act which caused the amendment of May 16, 1795 to the Constitution of 1789, which is unusual among State Constitutions of that day, "All powers not delegated by the Constitution as amended are retained by the people." Constitution of Georgia, 1789, Article VIII.

Not only did the Constitution of 1798 limit the power of the legislature to those fields described, but, in Article I, Sec. 22 and 23 (App. 52), Appellee submits that alienation of sovereignty was expressly prohibited. It coupled jurisdictional rights with territorial rights, and declared of both that they were held by the free citizens of the State in sovereignty, inalienable but by their consent, expressly declaring of the territorial rights that to such rights as the power of contract or sale by Legislature shall not extend.

Prior to 1833, this limitation on legislative power was judicially recognized. In State v. Dews, R. M. Charlton, 397, a Superior Court of Georgia disposed of the claims made by a public official to the effect that he had a property right in a public office, in the following language:

"As public agents, they are intrusted with the exercise of a portion of the sovereignty of the people—the just publicum, which is not the subject of grant, and can be neither alienated nor annihilated, and it would be a repugnant absurdity, as incomprehensible as it would be revolting that they can have a private property in that sovereignty."

Appellee submits that the contractual alienation of the sovereign right to tax was also incomprehensible to the Constitution delegates of 1798, and only this inability to comprehend and foresee an attempted alienation of the taxing power prevented an even more express injunction against such legislative action.

The breadth and scope of the opinion in the Dews ease, supra, is indicated by the following language which appears at page 414:

"Indeed with how much more force may it not be objected to such a proposition, that it is not adequate to the Legislature to grant to an officer privileges which impair or interfere with the powers necessarily and inseparable appertaining to the sovereign legislative power of the State, since it would violate the fundamental compact, the compact of the Constitution?"

This question arose again in the case of Hamrick'v. Rouse, 17 Ga. 56. We quote from the opinion of Judge Starnes on page 60:

... it is very certain that no Legislature has the right

to bind all subsequent Legislatures, all posterity, as to any matter of more political arrangement or expediency. The good faith of the State, or its people, under some circumstances, in a moral point of view, might become very decidedly pleaged by the Legislature to such political arrangement; but still, as a matter of contract, the Legislature could not bind posterity upon a subject of mere political expediency."

Again in the case of Bailey v. The State, 20 Ga. 742, we quote from the opinion of Judge Benning on page 744:

"No legislature has a power to curtail or to contract the power of a subsequent legislature."

The next case involving this question was that of Daly v. Harris, 33 Ga. Supp. 38. We quote from pages 50 and 51:

"Again, it is true of all governments invested with legislative power for the common weal, that no Legislature can, by contract, divest either itself or its successors of any power necessary to the well-being of the State. The Presbyterian Church v. The Mayor and Council of New. York, 5 Cowen, 538; Gosler v. Georgetown, 6 Wheaton, 593, Ohio Life Insurance and Trust Company v. Debolt: 16 Howard, 431; (opinions of Chief Justice Taney and Mr. Justice Campbell). Hamrick v. Rouse, 17 Ga. 59, 60; Bailey v. The State, 20 ibid. 744. Governments have, in themselves, no rights to be secured or interests to be protected. They are mere agencies established for the security of rights and the promotion of interests appertaining to the founders, who, by common consent, have become the governed. To this end, they have been invested with certain necessary powers, the ercise of which devolves upon different individuals, who, in the course of time, come successively into the government. If the depository of those powers for the passing hour, may alien any one of them, so as to deny itself and . its successor the exercise of it, all of the others may be so aliened, and the result would follow, that an agency established by society for certain specified ends, may, in

its discretion, defeat those very ends, which would be contrary to first principles, and subversive of all government."

In State v. Georgia Railroad & Banking Company, 54 Ga. 424, Judge McCay refers to these principles and to the decision of this Court in Ohio Life Insurance and Trust Company v. Debolt, 16 How. 431, in which Mr. Justice Taney clearly stated that the power of the Legislature to limit the powers of future Legislatures "must depend upon the Constitution of the State and the extent of the power therein granted to the legislative body." After clearly raising this question, Judge McCay does not decide it, but instead expressed the view that he was bound by decisions of this Court, no one of which is concerned with the nature and limitation of powers granted by the Georgia Constitution of 1798.

The personal views of Judge Bleckley, who succeeded Judge McCay within a few months after this decision, expressed in Atlantic & Gulf Railroad Company v. State, 55 Ga. 321, decided at the July Term, 1875, after the decision in the Georgia Railroad case at the January Term of that year, were:

"Whatever power legislative bodies may have in other states of the union to part with or limit the essential prerogatives of sovereignty, no such power exists, or ever has existed, in the general assembly of Georgia. Consequently, all exemptions from the common burdens of taxation hitherto granted by the statute to corporations or others, ought to be construed as privileges only, and as revocable at the will of the legislature."

No constitutional attack was made upon the Act of 1833 in State v. Georgia Railroad & Banking Company, 54 Ga. 424, as is clearly shown by the record in that case. (R. 134-160.)

Upon this point, Judge McCay's remarks are therefore obiter dicta.

The reservation to the people of powers not expressly

delegated was recognized by the Supreme Court of Georgia as late as March, 1947, in Thompson v. Talmadge, 201 Ga. 867, which refers with approval to State v. Dews, supra. At page 879, Chief Justice Duckworth said, in another connection:

"In this State all power and sovereignty repose in the people. The Departments of the State Government have and can exercise only such power as the people have conferred upon them by the Constitution."

The language of Article 4, Section 1, Paragraph 1, of the Constitution of 1877 was but a more explicit enunciation of the constitutional principle already embodied in Sections 23 and 24 of the Constitution of 1798.

- "Taxation, a sovereign right. The right of taxation is a sovereign right—inalienable, indestructible—is the life of the State, and rightfully belongs to the people in all Republican governments, and neither the General Assembly, nor any, nor all other departments of the Government established by this Constitution, shall ever have the authority to irrevocably give, grant, limit or restrain this right; and all laws, grants, contracts, and all other acts, whatsoever, by said government, or any department thereof, to effect any of these purposes, shall be, and are hereby declared to be null and void, for every purpose whatsoever; and said right of taxation shall always be under the complete control of, and revocable by, the State, notwithstanding any gift, grant, or contract, whatsoever, by the General Assembly."
- b. If here was was a valid contract granting perpetual limitation upon appellant's tax liability, it was rendered unconstitutional and void by the adoption of he 14th Amendment to the Constitution of the United States.

Section 27 of Art. I of the Georgia Constitution of 1868 provided for ad valorem taxation upon property as a major means of revenue. It further provided that this taxation should be uniform on all species of property taxed. The Georgia Constitution of 1868 was adopted at an election held on April 30th of that year. The Legislature was convened on the following 4th of July, and on July 21st it ratified the 14th Amendment to the Federal Constitution. On that same day the 14th Amendment became effective. The subsequent Georgia Constitution of 1877 likewise contained, in Article VII, Section 2, Paragraph 1, provision with respect to the taxation of aproperty as follows:

"All taxation shall be uniform upon the same class of subjects, and ad valorem upon all property subject to be taxed within the territorial limits of the authority levying the tax and shall be levied and collected under general laws . . ."

The imposition of a general property tax being required by the State Constitution, appellee insists that under the mandate of the 14th Amendment it must be applied uniformly to those railroad corporations which have charter tax exemption, as well as to those which have no such exemption. Equal protection of the laws may be as well denied by the grant of special privileges to a select few as by the imposition of exceptional burdens upon arbitrarily selected groups. This Court in Hartford Steam Boiler Insurance Company vs. Harrison, 301 U. S. 459, has said upon the question of classification and discrimination:

"The applicable principle in respect of classification has often been announced. It will suffice to quote a paragraph from Louisville Gas & Electric Company ws. Coleman, Auditor, 277 U. S. 32, 37, 38:

It may be said generally that the equal protection clause means that the lights of all persons must rest upon the same rule under similar circumstances, Kentucky Rathroad Tax Cases, 115 U.S. 321, 337; Magoun vs. Illinois Trust & Savings Bank, 170 U.S. 283, 293, and that it applies to the exercise of all the powers of the state which can affect the Individual or his property, including the power of taxation. County of Santa Clara

vs. Southern Pac. R. Co., 18 F. 385, 388, 399; The Railroad Tax Cases, 13 F. 722, 733. It does not, however, forbid classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility provided always that the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Royster Guano Co. vs. Virginia, 253 U. S. 412, 415; Airway Corp. vs. Day, 266 U.S. 71, 85; Schlesinger vs. Wisconsin, 270 U. S. 230, 240. That is to say, mere difference is not enough; the attempted classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis," Gulf, Colorado & Santa Fe Ry. Co. vs. Ellis, 165 U.S. 150, 155. Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision. Compare Martin vs. District of Columbia, 205 U. S. 135, 139; Bell's Cap R. R. Co. vs. Pennsylvania, 134 U. S. 232, 237

"Despite the broad range of the state's discretion, it has a limit which must be maintained if the constitutional safeguard is not to be overthrown. Discriminations are not to be supported by mere fanciful conjecture. Borden's Company ws. Baldwin, 293 U. S. 194, 209. They cannot stand as reasonable if they offend the plain standards of common sense."

c. It a valid contract of tax limitation existed, Appellant is not now entitled to summary judgment there on for the reason that it has failed to comply with its obligations and its contract rights have been forfeited.

In order to be entitled to summary judgment, it is incum-

bent upon Appellant to show that it has fully complied with the contract which it seeks to enforce against the State.

The title of the Act of 1833 provides, in part, as follows:

"An Act to incorporate the Georgia Railroad Company, with powers to construct a Rail or Turnpike Road from the City of Augusta, with branches extending to the Towns of Eatonton, Madison in Morgan County, and Athens, to be carried beyond those places, at the discretion of said Company, . . ."

The purposes of acorporation as stated in the Act are as follows:

. completion of a railroad communication between the city of Augusta and some point in the interior of the State, to be agreed upon by the stockholders, which road shall be called the Union Railroad; and the same being completed, the Company shall have power to construct three branch railroads, beginning at the point agreed upon as the termination of the Union Road, or such point for the middle road as the stockholders may select; one funning to Athens one to Eatonton, and the other to Madison, in Morgan County; which branches shall be erected simultaneously: Provided, the amount of stock subscribed will warrant the completion of all at the same time, and if the stock subscribed will not warrant the completion of all of said branches at one and the same time, then that branch shall be first completed which the stockholders may by vote designate. The Company shall have the further power to continue the Athens branch towards any point which may be agreed upon, on the Tenessee River-all of which shall be done at such time and in such manner as the stockholders may direct."

It is Appellee's contention that it is a part of Appellant's case to show that it has complied with the terms of the statute.

Section 15 of the Act as to the alleged exemption provides

The stock of said Company and its branches shall

be exempt from taxation for and during the term of 7 years from and after the completion of the said railroads or any one of them: and after that, shall be subject to a tax not exceeding one-half per cent. per annum on the net proceeds of their investment."

Neither of the roads from Union Point to Eatonton nor from Athens to the vicinity of Chattanooga, as required by the charter, has been completed.

Upon this point the Supreme Court of Georgia said, in Ordinary v. Central Railroad and Banking Company, 40 Ga. 647, 652:

"It is insisted that this is a contract between the State and the company, which forever exempts the company from a higher tax than one-half of one per cent, on its not income, and that they are entitled to this perpetual exemption from taxation, no matter what may be the exigencies of the State or the burdens of taxation upon her people. If this be so, it is certainly but just to hold the company to such part of the contract as is favorable to the public."

The same Court, in Singleton v. Southwestern, Railroad Company, 70 Ga. 464, said:

"A corporation has only the power conferred upon it by charter. Its grants of powers and exemptions are always to be strictly construed, and its obligations are to be strictly performed, whether they may be due to the state or to individuals." (Emphasis supplied)

The law of the State upon this question is controlling.

Bacon v. Texas, 163 U. S. 207.

IV.

In no event should Appellant have summary judgment establishing exemption to its branch from Madison to Atlanta because that branch was never included within the limitation provisions.

Even should Appellant's claim to tax exemption under the alleged contract between the State of Georgia and Appellant be established, that alleged contract made no provision for the construction of a railroad from Madison, Georgia, to Atlanta. The legislation providing for the construction of this Branch was enacted in 1837 by the General Assembly. Georgia Laws 1837, page 216 (App. 56). That Act provided that Appellant should have the right and was "authorized and empowered" to continue its railroad from Madison along the line now known as the Madison-Atlanta Branch. The Act provided that,

Banking Company, shall have all the powers and privileges, rights and immunities in the construction of said Branch from Madison, as aforesaid, to the said State Railroad, as are contained in the several Acts heretofore passed, and now of force, constituting the Charter of the Georgia Railroad and Banking Company as fully as if the said continuation had been originally a part of the Georgia Railroad; and the said Acts shall extend to and regulate the construction of said extended road hereby authorized to be constructed, in the same manner, and to the same extent, and for the same purpose and uses, as the same have been used and applied to the Georgia Railroad and its branch from the city of Augusta to the said town of Madison,"

It must be noted that the "powers and privileges, rights, and immunities" provided for in the Act are allowed to Appellant only "in the construction of said Branch." Appellee does not question the fact that Appellant did enjoy the exemption granted by the previous Acts of the Legislature in its construction of the line from Madison to Atlanta; however, it is earnestly insisted that when the construction was concluded the exemption was likewise terminated.

No other construction of the Act is possible under the rule which requires that a surrender of the power to tax must be shown by clear and unambiguous language which will admit

of no reasonable construction consistent with the reservation of the power. Delaware Railroad Tax Case, 18 Wall. 207. West Wisconsin Railway Company vs. The County of Trempealeau, 93 U. S. 595. See also the language in Vicskburg, S&P Rail Company vs. Dennis, 116 U. S. 665, wherein the Court said:

"A state is never to be presumed to have relinquished its power of taxation unless its intention so to do is clearly expressed in language to that effect."

Far from indicating a legislative intent to exempt the Madison-Atlanta branch from taxation after its construction, the confrary intent is clearly expressed and, there being no question as to the completion of the branch, it is now vaxable.

CONCLUSION

It is respectfully submitted that the judgment in the District Court dismissing Appellant's complaint should be affirmed and that in no event should summary judgment for the Appellant be directed.

Respectfully submitted,

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APPENDIX

Georgia Constitutioinal provisions and Statutes cited.

SECTIONS XXII, XXIII AND XXIV OF ARTICLE I OF THE GEORGIA CONSTITUTION OF 1798

(The italicised portion being material to the consideration of the questions involved in this case.)

"Sec. XXII. The general assembly shall have power to make all laws and ordinances which they shall deem necessary and proper for the good of the State, which shall not be repugnant to this constitution." (Italics supplied.)

"Sec. XXIII. They shall have power to alter the boundaries of the present counties, and to lay off new ones, as well out of the counties already laid off, as out of other territory belonging to the State; but the property of the soil, in a free government, being one of the essential rights of a free people, it is necessary, in order to avoid disputes, that the limits of this State should be ascertained with precision and exactness; and this convention composed of the immediate representatives of the people, chosen by them to assert their rights, and to revise the powers given by them to the government, and from whose will all ruling authority of right flows, doth assert and declare the boundaries of this State to be as follows: That is to say, the limits, boundaries, jurisdictions, and authority of the State of Georgia, do, and did, and of right ought to extend from the sea, or the mouth of the river Savannah, along the northern branch or stream thereof, to the fork or confluence of the rivers now called Tugalo and Keowee, and from thence along the most northern branch or stream of the said. Tugalo, till it intersects the northern boundary line of South Carolina. If the said branch or stream of Tugalo extends so far north, reserving ali the islands in the said rivers Savannah and Tugalo to Georgia; but if the head spring or source of any branch or stream of the said river Tugalo does not extend to e north boundary line of South Carolina, then a west line to the Mississippi to be drawn from the head spring or course of the said branch or

stream of Tugalo river, which extends to the highest northern latitude: thence down the middle of the said river Mississippi, until it shall intersect the northernmost part of the thirty-first degree of north latitude; south by a line drawn due east from the termination of the line last mentioned, in the latitude of thirty-one degrees north of the equator, to the middle of the river Apalachicola or Chattahoochee; hence along the middle thereof to its junction with Flint river, thence straight to the Thead of St. Mary's river, and thence along the middle of St. Mary's river to the Atlantic Ocean; and from thence to the mouth or inlet of Savannah river, the place of beginning. Including and comprehending all the lands and waters within the said limits, boundaries, and jurisdictional rights, and also all the islands within twenty leagues of the sea coast. And this convention doth further declare and assert, that all the territory without the present temporary line and within the limits aforesaid, is now of right the property of the free citizens of this State, and held by them in sovereignty, inalienable but by their consent: Provided nevertheless, that nothing herein contained shall be construed so as to prevent a sale to, or contract with the United States, by the legislature of this State, of and for all or any part of the western territory of this State, laying westward of the river Chattahoochee, on such terms as may be beneficial to both parties; and may procure an extension of settlement, and an extinguishment of Indian claims in and to the vacant territory of this State, to the east and north of the said Chattahoochee, to which territory such power of contract or sale, by the legislature, shall not extend; And provided also, the legislature may give its consent to the establishment of one or more governments westward thereof; but monopolies of land by individuals being contrary to the spirit of our free government, no sale of territory of this State, or any part thereof, shall take place to individuals or private companies, unless a county or counties shall have been first laid off, including such territory, and the Indian rights shall have been extinguished thereto." (Italics supplied.)

Sec. XXIV. The foregoing section of this article having declared the common rights of the fee citizens of this State

in and to all the territory without the present temporary boundary line, and within the limits of this State thereby defined, by which the contemplated purchases of certain companies of a considerable portion thereof are become constitutionally void; and justice and good faith require that the State should not detain a consideration for a contract which has failed; the legislature, at their next session, shall make provision by law for returning to any person or persons who has or have bona fide deposited moneys for such purchases in the treasury of this State; Provided that the same shall not have been drawn therefrom in terms of the act passed the 13th day of Feb. 1796, commonly called the rescinding act, or the appropriation laws of the years 1796 and 1797; nor shall the moneys paid for such purchases ever be deemed a part of the funds of this State, or be liable to appropriation as such; but until such moneys be drawn from the treasury, they shall be considered altogether at the risk of the persons who have deposited the same. No money shall be drawn out of the treasury, or from the public funds of this State, except by appropriation made by law, and a regular statement and account of the receipts and expenditures of all public moneys shall be published from time to time. No vote, resolution, law, or order shall pass the general assembly, granting a donation or gratuity in favor of any person whatever, but by the concurrence of two-thirds, of the general assembly." (Italics supplied.)

Art. 1, Section 27 of Georgia Constitution of 1868:

"The power of taxation over the whole State shall be exercised by the general assembly only to raise revenue for the support of government, to pay the public debt, to provide a general school-fund, for common defense and for public improvement; and taxation on property shall be ad valorem only, and uniform on all species of property taxed."

ARTICLE IV, SECTION I, PARAGRAPH I OF THE GEORGIA CONSTITUTION OF 1877

"The right of taxation is a sovereign right—inalienable, indestructible—is the life of the State, and rightfully belongs to the people in all Republican governments, and neither the General Assembly, nor any, nor all other departments of the Government established by this Constitution, shall ever have the authority to irrevocably give, grant, limit, or restrain this right; and all laws, grants, contracts, and all other acts, what soever, by said government, or any department thereof, to effect any of these purposes, shall be, and are hereby, declared to be null and void, for every purpose whatsoever; and said right of taxation shall always be under the complete control of, and revocable by, the State, notwithstanding any gift, grant, or contract, whatsoever, by the General Assembly."

Section 15 of Act of Georgia Legislature, December 21, 1833, incorporating Georgia Railroad Company:

Sec. 15. The exclusive right to make, keep up and use the Railroads and transportations, authorized by this Act, shall be for and during the term of thirty-six years, to be computed from the time when the said Road from Augusta to either of the points hereinbefore designated, shall be completed for transportation, Provided, That the subscription of stock or shares of said Company to the amount of at least five thous sand shares as aforesaid, be filled up within six months from the passing of this Act, and the work from, or between Augusta, and either of the places hereinbefore first mentioned, be commenced within two years and be completed within six years after the five thousand shares shall be subscribed. And after said term of thirty-six years shall have elapsed, though the Legislature may authorize the construction of other Railroads, for the trade and intercourse contemplated herein: Nevertheless, The Georgia Railroad Company shall remain and be incorporate, and vested with all the estate, powers and privileges as to their own works herein granted and secured, except the exclusive right to make, keep up, and use Railroads over and through such parts of the country, that shall so have

expired by the foregoing limitations; but the Legislature may renew and extend that exclusive right, upon such terms as may be prescribed by law, and be accepted by the said incorporated Company. The stock of the said Company and its Branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said Railroads, or any one of them; and after that, shall be subject to a tax not exceeding one-half per cent. per annum on the net proceeds of their investments.

Act approved December 25, 1837, amending Charter of the Georgia Railroad & Banking Company:

Whereas, By an Act entitled "An Act to authorize the construction of a Railroad communication from the Tennessee line, near the Tennessee river, to the point on the southeastern bank of the Chattahoochee river, mostly eligible for running branch roads, thence to Athens, Madison, Milledgeville, Forsyth and Columbus, and to appropriate monies therefor," encouragement is held out in the tenth section of said Act, for the construction of branch Railroads from the terminus of said State Railroad, on the Chattahoochee river, to the several towns of Athens Madison, Milledgeville, Forsyth and Columbus:

AD WHEREAS, in pursuance of the views of said Act, the Monroe Railroad Company, and the Chattahoochee Railroad Companies have obtained the privilege, by acts of the Legislature, to connect their roads with said State Railroad;

Now, for the purpose of extending a like privilege to the Georgia Railroad and Banking Company, to continue their Road from the town of Madison, to pass through or near the town of Covington, to the said State Railroad, on the Chattahoochee river:

SEC. 1. Be it enacted, etc., That the said Georgia Railroad and Banking Company shall have the right, and they are hereby authorized and empowered to continue their Railroad from the town of Madison, in Morgan County, to pass through or near Covington, in the County, of Newton, to cornect with and join the Railroad, about to be constructed by the State,

from the Tennessee line, near the Tennessee river, to the southeast bank of the Chattahoochee river, as contemplated by the Act recited in the foregoing preamble, and for that purpose the said Georgia Railroad and Banking Company shall have all the powers and privileges, rights and immunities in the construction of said branch from Madison, as aforesaid, to the said State Railroad, as are contained in the several acts heretofore passed, and now of force, constituting the charter of the Georgia Railroad and Banking Company, as fully as if the said continuation had been originally a part of the Georgia Railroad, and the said acts shall extend to and regulate the construction of said extended road, hereby authorized to be constructed, in the same manner, and to the same extent, and for the same purposes and uses, as the same have been used and applied to the Georgia Railroad and its branch from the city of Augusta to the said town of Madison.

Georgia Code, 1933, Section 39-1003.

"Affidavit of illegality not to be received until after levy.— No affidavit of illegality shall be received by any sheriff, or other executing officer, until a levy shall have been made. (Act 1838, Cobb, 514.)"

Act of February 28, 1874, as amended, codified as Sections 92-2602, 92-2603, 92-2604, Georgia Code of 1933:

Section 92-2602.

"Presidents to make returns.—The presidents of all the railroad companies, including street railroads, dummy railroads, and electric railroads in this State shall be required to return on oath, annually, to the Comptroller General, the value of the property of their respective companies, without deducting their indebtedness; each class or species of property to be separately named and valued, so far as the same may be practicable, to be taxed as other property of the people of the State; and said return shall be made under the same regulations provided by law for the returns of officers of other incorporated companies, which are required by law to be made to the Comptroller General: Provided, that the said railroads

shall be taxable for city purposes as other property is taxed for city purposes, and any law making railroad companies taxable by counties will be applicable to street railroad companies of every character. (Acts 1874, p. 107; 1889, p. 36.)

Section 92-2603.

"Presidents to pay taxes assessed.—Said presidents shall pay to the Comptroller General the taxes assessed upon the property of said railroad companies; and on failure to make the returns required by the preceding section, or on failure to pay the taxes so assessed, the Comptroller General shall proceed to enforce the collection of the same in the manner provided by law for the enforcement of taxes against other incorporated companies. (Acts 1874, p. 107.)

Section 92-2604.

"Illegality to resist tax; venue.—If any railroad company affected by the preceeding sections desires to resist the collection of the tax therein provided for, said company through its proper-officer may, after making the return required in section 92-2602, and after paying the tax levied on such corporation and continuing to pay the same while the question of its liability herein is undermined, resist the collection of the tax above provided for, by filing an affidavit of illegality to the execution or other process issued by the Comptroller General, stating fully and distinctly the grounds of resistance, which shall be returnable to the superior court of Fulton county, to be there determined as other illegalities; the same to have precedence of all cases in said court as to time of hearing, and with the same right of motions for new trial and writs of error as in other cases of illegality, in which case the Comptroller General shall be represented by the Attorney General of the State. If the grounds of such illegality are not sustained, the Comptroller General shall, after crediting the process aforesaid with the amount paid, proceed to collect the residue due under the provisions aforesaid; and if, at any time during the pendency of any litigation herein provided for, the said corporation fail to pay the tax required to be paid as a condition of hearing, said illegality shall be dismissed, and no second affidavit of illegality shall be allowed. Said illegality may be amended as other affidavits of illegality, and shall always be accompanied by good bond and security for the payment of the tax execution issued by the Comptroller General. (Acts 1874, p. 107; 1931, pp. 7, 38.)"

Georgia Code, 1933, Section 92-6001.

"Assessment to correct returns.—The Comptroller General shall carefully scrutinize the returns made to him, and if in his judgment the property embraced therein is returned below its value, or the return is false in any particular, or in any wise contrary to law, he shall within 60 days thereafter correct the same and assess the value, from any information he can obtain. (Acts 1877, p. 126; 1905, p. 68.)"

Georgia Code, 1933, Section 92-6002.

"Arbitration of assessmnts to correct returns.—In all cases of assessment or correction of returns, as provided in section 92-6001, the officer or person making such returns shall receive notice and, if dissatisfied with the assessment or correction of returns, shall have the privilege, within 20 days after such notice, to refer the question of the true value or oamount to arbitrators—one chosen by himself and one by the Comptroller General-who, in case of disagreement, may choose an umpire. If the two arbitrators, disagreeing, fail to select an umpire within 30 days after receiving/notice of their appointment, the Governor shall appoint two arbitrators who, with the arbitrator selected by the officer or person making the returns, shall determine the question as to the amount or value. Every arbitrator or umpire chosen hereunder shall be a citizen of Georgia. The award shall be made within 30 days from the appointment of the unpire or, in case no umpife is chosen, within 30 days from the appointment of arbitrators by the Governor; and their award shall be final. (Acts 1877, p. 126; 1878-9, p. 166; 1905, p. 68.)"

Georgia Code, 1933, Section 92-6801. "Taxes how assessed and collected.—In all cases where taxes are authorized for any purpose and no adequate provision is made in the law authorizing the same or in the general law for giving the taxpayer notice and opportunity to be heard as to the valuation and taxability of his property, the method of assessing and collecting said taxes shall be as set forth in this Chapter. (Acts 1910, p. 22.)"

Georgia Code, 1933, Section 92-6802.

"Assessment by the Comptroller General; arbitration.—
Where the property subject to said tax is such as is returnable to the Comptroller General, he shall assess the same at the valuation fixed in the annual returns, if said returns are satisfactory to him; if not, he shall within 60 days after receiving said returns make an assessment of the property from the best information he can procure, and notify in writing the officer or person making such returns, who shall have the privilege within 20 days after receiving such notice to refer the question of true value to arbitrators, one to be chosen by himself, and one to be chosen by the Comptroller General, with power in the two so chosen to choose an umpire in case of disagreement; and their award shall be final. (Acts 1910, pp. 22, 23.)"

Georgia Code, 1933, Section 92-6104.

"Issue of taxability, where tried.—If the definquent under section 92-6102 disputes the taxability of such property, he may raise the question by petition in equity in the superior court of Fulton County, and if such delinquent is dead, his personal representative or representatives shall have the same right. (Acts 1918, p. 234.)"

Georgia Code, 1933, Section 92-6910.

"Chairman and secretary of board; employment of agent to seek out unreturned property.—The county board of tax assessors shall elect one of their number as chairman for such term as they shall fix. The board shall have authority to

employ a competent person to serve as secretary. He shall keep a record of the proceedings of the board, and shall receive for his services in this capacity such compensation as may be fixed by the board of county commissioners or other authority in charge of the financial affairs of the county but not less than \$3 per day while actually attending sessions of the board; the same to be paid out of the county treasury in the same manner in which other county payments are made. The board shall have authority to employ agents to seek out all unreturned taxable stocks and bonds together with all other classes of unreturned taxable property in the county and bring it to the attention of said board. Said agent shall be allowed for such services a commission of not more than 10 per cent, of the amount of tax collected by the county for county and school purposes from such unreturned property so discovered and o placed on the digest by the efforts of said agents. The commission allowed said agents shall be paid from the county treasury out of the amounts so placed on the books by the said agents and when collected by the county as a part of the expense of said board. (Acts 1937, pp. 517, 518.)"

Georgia Code, 1933, Section/92-6911.

"Meeting of board; duties.—The board of county tax assessors in each county may meet at any time to receive and inspect the tax returns to be laid before them by the tax receiver as hereinfore provided. The board shall examine all the returns of both real and personal property of each tax-payer, and if in the opinion of the board any taxpayer has omitted from his returns any property that should be returned or has failed to return any of his property at a just and fair valuation, the board shall correct such returns and shall assess and fix the just and fair valuation to be placed on the property and shall make a note thereof and attach the same to the returns. It shall be the duty of the board to see that all taxable property within the county is assessed and returned at its just and fair valuation and that valuations as between the individual taxpayers are fairly and justly equalized so that each taxpayer shall pay as near as may be only his

proportionate share of taxes. When any such corrections, changes or equalizations shall have been made by the board, the board shall, within a period of five days, give notice to any taxpayer of any changes made in his returns, either personally or by leaving same at his residence or place of business or by sending said notice through the United States mails to his last known place of address. In all cases where an assessment is made or return is changed or altered by authority of the county tax assessors, as herein provided, and notice is not given personally to the tampayer as herein provided, the notice of such assessment or of such change shall be posted in front of the courthouse door, which posted notice shall contain the name of the owner liable to taxation, if known, and a brief description of the property, if owner is unknown, together with a statement that the assessment has been made, or the return changed or altered as the case may be, and need not contain other information. It shall be the duty of the ordinary of the county to make a certificate as to the posting of such notice, which certificate signed by the ordinary shall be recorded by the board of tax assessors in a book kept for that purpose. A certified copy of such certificate of the ordinary duly authenticated by the secretary of the board, shall constitute prima facie evidence of the porting of such notice as required by law. (Acts 1937, pp. 517, 519.)

Georgia Code, 1933, Section 92-6913.

Duty to ascertain what property is subject to taxation.—It shall be the duty of the board to diligently investigate and inquire into the property owned in the county for the purpose of ascertaining what property, real and personal, is subject to taxation in the county and to require its proper returns for taxation. The board shall make such investigation as may be necessary to determine the value of any property upon which for any reason all taxes due to the State or to the county have not been paid in full as required by law, and, in all cases where the full amount of taxes due the State or county have not been paid, it shall be the duty of the tax assessors to assess against the owner, if known, and the property, if the owner

is not known, the full amount of taxes which have accrued and which may not have been paid at any time within the statute of limitations. In all cases where taxes are assessed against the owner of property, the tax assessors may proceed to assess the same against the owner thereof according to the best information obtainable and such assessment, if otherwise lawful, shall constitute a valid lien against the property so assessed. In all cases where unreturned property is assessed by the board after the time provided by law for making tax returns has expired, the board shall add to the amount of State and county taxes due a penalty of 10 per cent., except. that if the principal sum of the tax so assessed is less than \$10 in amount, the board shall add to the amount of State and county taxes a penalty of \$1. The penalty therein provided shall be collected by the county tax collector or the county tax commissioner and in all cases paid into the county treasury and remain the property of the county. (Acts 1913, pp. 123, 128; e1937, pp. 517, 521.)".

Section 80 of Act approved August 28, 1931, known as Reorganization Act, Georgia Laws 1931, page 7, codified as Section 92-7301, Georgia Code of 1933.

"Levy of tax executions by State Revenue Commission. Il- 46 legality.—In the case of any tax due the State or any tax assessed by the State Revenue Commission, whether so secifically provided in the law levying the tax or not, the Comission is empowered to issue an execution hearing teste in the name of the chairman of the Commission and directed to all and singular the sheriffs or this State, commanding them to levy upon the goods and chattels, lands, and tenements of the taxpayer, which execution it shall be the duty of any sheriff to execute as in case of writs of execution from the superior courts. Whenever any such writ of execution has issued, the taxpayer, in order to determine whether the tax is legally due, may tender to the levying officer his affidavit of illegality thereto; and upon the payment of the tax if required as a condition precedent by the law levying the tax, and upon his g ving a good and solvent bond for the eventual condemnation money in cases where said law does not require the payment

of the tax as a condition precedent, the levying officer shall return the same to the superior court of the taxpayer's residence, except in case the law provides otherwise, and the same shall be summarily heard and determined by the court. (Acts 1931, pp. 7, 33.)"

Sections 29, 30, 31 and 45 of Act of January 3, 1938, Georgia Laws, Ex. Sess. 1937-38, page 77.

"Section 29. Notice of Assessment. In all cases in which the Commissioner is required by law toeprovide an opportunity for protest the license fee shall become final if no written protest is filed by the taxpayer with the said Commissioner within thirty (30) days of the date of such notice. For the purpose of this section said notice shall be deemed to have been given if written notice is deposited in the mails registered and addressed to the txpayer at the last known address of such taxpayer. If no such record is on file said notice shall be by personal service.

· SECTION 30. Protests. Any taxpayer may contest any additional assessment or license made or determined by the Commissioner by filing with the said Commissioner a written protest at any time within thirty (30) days from the date of notice of the assessment or license. All protests shall be prepared in such form and contain such informtion as the Commissioner shall reasonably require and shall include in any case a summary statement of the grounds upon which the taxpayer relies and his reasons for disputing the finding of the Commissioner. In the event the taxpayer desires a conference or hearing, such fact must be set out in the protest. The Commissioner shall grant such a conference before his officers or agents as he may designate, at a time he shall spcify, and shall make such reasonable rules governing the conduct of conferences as he may deem meet and proper. The discretion herein given to the Commissioner shall be reasonably exercised

SECTION 31. Final Assessments. In all cases in which protests are filed by taxpayers, as provided by law, the Commissioner shall consider the information contained in such pro-

on all occasions.

tests and information submitted by taxpayers in conferences or hearing before the said Commissioner, his officers or agents, and shall proceed to make final assessment or to fix a final license fee and notify the taxpayer of the amount thereof, subject to the right of appear as provided in this Act.

SECTION 45. Review of Board's decision. Jurisdiction of the Superior Courts. The findings by the Board of Tax appeals shall not be final; but either party may appeal from any order, ruling, or finding of the said Board to the Superior Court of the county of the residence of the taxpayer unless the taxpayer be a railroad or other public service corporation or non-resident, in which event the appeal of either party shall be to the Superior Court of the County in which is located its principal place of doing business, or in which the chief or highest corporate officer, resident in the State, maintains his office. The appeal and necessary records shall be certified and transmitted by the Chairman of the Board and shall be filed with the Clerk of the Superior Court within thirty (30) days from the date of judgment by the Board. The procedure provided by law for applying for and granting appeal from the Court of Ordinary to the Superior Court shall apply as far as suitable to the appeal authorized herein, except that the appeal authorized herein may be filed within fifteen (15) days from the date of judgment by the Board.

Before the Superior Court shall have jurisdiction to entertain such appeal filed by any aggrieved taxpayer, such taxpayer shall file with the Clerk of the Superior Court a writing whereby such taxpayer shall agree to pay on the date or dates the same shall become due all taxes for which such taxpayer has admitted liability and shall within thirty (30) days from the date of judgment by the Board file with the Clerk of the Superior Court, except where appellant owns real property in Georgia, the value of which is in excess of the amount of the tax in dispute, bond in amount satisfactory to such Clerk or other security in amount satisfactory to such Clerk or other security in amount satisfactory to such Clerk conditioned to pay any tax over and above that which the taxpayer has admitted liability for which shall be found to be due by a final judgment of court, together with interest and costs.

It shall be ground for dismissal of the appeal if the taxpayer fails to pay all taxes admittedly owed upon the due date or dates as now or hereafter provided by law.

If the final judgment of court places upon the taxpayer any tax liability which he has not already paid, he shall pay the same on the due date or dates now or hereafter fixed by law if the tax or any of same has not become due on the date of said final judgment of court. And if the tax or any of the same has already become due at the time of final judgment of court, the taxpayer shall immediately pay the tax or so much thereof as has already become due, with interest, and shall pay the pourt costs, in the event the final judgment of court is adverse to the taxpayer, no matter whether the tax or any part of same has or has not become due at the time of said final judgment of court.

Sections 18, 19 and 20, taken from Act of February 17, 1943, (Georgia Laws 1943, page 204), amending Act of January 3, 1938, (Georgia Laws 1937-38, Ex. Sess., page 77):

"SECTION 18. Except as otherwise provided by this Act, all matters, cases, claims and controversies, of whatsoever nature arising in the administration of the revenue laws, or in the exercise of the jurisdiction of the State Revenue Commissioner or the Department of Revenue, as conferred by this act, shall be for determination by the State Revenue Commissioner. subject to review by the court as provided by Section 45 of Chapter IV of this Act. The effect of this section shall be that, except as hereinafter provided, all final rulings, orders and judgments of the State Revenue Commissioner shall be subject to appeal and review under Section 45 of this act in the same manner, under the same procedure, and as fully, as if same had been considered and passed upon by the Board of Tax Appeals. Any such appeal from a final ruling, order, or judgment of the State Revenue Commissioner shall be o entered within the time prescribed by Section 45 of the Act; Provided, however, that nothing herein contained, and no provision of this Act, shall be construed to deprive a taxpayer against whom an execution for taxes has been issued under an assessment by the State Revenue Commissioner of the right to resist enforcement of the same by affidavit of illegality.

'All petitions for review filed and now pending before the Board of Tax Appeals shall be and they are hereby dclared to be in the same position as if the ruling, order, finding or assessment of the Commissioner therein complained of and sought to be reviewed had been affirmed by the Board of Tax Appeals; and all such rulings, orders, findings or assessments now pending for review before the Board of Tax Appeals shall be final and conclusive unless the taxpayer who filed said petition for review shall, within thirty (30) days from the date of the passage of this Act, appeal said ruling, order, finding or assessment to the Superior Court in the manner provided by Code Section 92-8446, except that in the case of a . foreign corporation domesticated in Georgia the appeal shall be made within the time herein prescribed to the Superior Court of the County in which such foreign corporation was domesticated in Georgia.'

"SECTION 19. The provisions of the foregoing section with reference to reviewing assessments of the State Revenue Commissioner shall not apply to assessments for ad valorem taxation against any person, corporation or company which was required by Chapter 92-59 of the Code of 1933 to return his or its property for ad valorem taxation to the Comptroller General and is now required by such chapter and this Act of January 3, 1938, to make such returns to the State Revenue Commissioner. The State Revenue Commissioner shall carefully scrutinize such returns made to him, and if in his judgment the property embraced therein is returned below its value or the return is false in any particular, or in any wise contrary to law, he shall, within sixty days thereafter, correct the same and assess the value, from any information available. If any such person, corporation or company shall be dissatisfied with the assessment or correction of such returns as made by the State Revenue Commissioner or the Department of Revenue, such taxpayer shall have the privilege, within twenty days after notice of such assessment and correction, to refer the question of true value or amount to arbitrators as pro-

vided for by Chapter 92-60 of the Code of Georgia of 1933. Such arbitrators shall consist of one chosen by the taxpayer and one chosen by the Governor. If the arbitrators thus chosen shall be in disagreement, they shall choose an umpire. If such arbitrators disagree and fail to select an umpire within thirty days after receiving notice of their appointment, the Chief Justice of the Supreme Court of Georgia shall select an umpire. Every arbitrator or umpire chosen hereunder shall be a citizen of Georgia. The award shall be made by the arbitrators or by the arbitrators and the umpire, as the case may be, within thirty days from the appointment or selection of such umpire. The decision and award of the arbitrators or of the arbitrators and the umpire shall be subject to appeal and review in the same manner as decisions and orders of the State Board of Tax Appeals were subject to appeal and review under the terms of Section 45 of This Act.'

"'SECTION 20. Sections 92-7004 to 92-7006 of the Code of Georgia of 1933, which relate to arbitration of State Revenue Commission's equalization of county assessments are hereby repealed. Chapter 92-60 (Section 92-6001 to 92-6007) of the Code of Georgia of 1933, as modified by the provisions of the foregoing Section 19, shall continue and remain in full, force and effect as if fully set forth herein."

LIBRARY SUPREME COURT, U.S.

DEC 29 1950

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1950 1951

No. K

GEORGIA RAILROAD & BANKING COMPANY,
Appellant

OVS.

CHARLES D. REDWINE, State Revenue Commissioner,
Appellee

Answer of Appellee to Motion to Terminate Continuance

EUGENE COOK, Attorney General of Georgia

M. H. BLACKSHEAR, JR., Deputy Assistant Attorney General of Georgia

el-WARD E. DORSEY of Counsel for Appellee VICTOR DAVIDSON Counsel for Amici Curine

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1950

No. 4

GEORGIA RAILROAD & BANKING COMPANY,
Appellant

VS.

CHARLES D. REDWINE, State Revenue Commissioner,
Appellee

Answer of Appellee to Motion to Terminate Continuance

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Appellee, Charles D. Redwine, who is State Revenue Commissioner of Georgia, objects to and opposes appellant's motion to terminate the continuance ordered by this Court on February 20, 1950, and for cause thereof says:

1.

Since entry of the order of continuance the state remedies pointed out have been asserted and the issues, presented are in the process of adjudication by the State Courts of Georgia. More specifically, the injunction pending appeal was modified by consent of the parties; the valuation of appellant's properties for each of the years in controversy was determined, (App. p. 7); appellant filed written protest to the tentative

determination by the appellee Revenue Commissioner that the property in question was subject to ad valorem taxtion; hearing was had by the Commissioner of Revenue upon this protest, briefs were submitted and, on September 21, 1950, decision was rendered holding the property subject to tax and fixing the amount of tax for each of the years in question and for all of the political subdivisions involved (App. p. 9); appeal from this administrative decision was duly entered to the Superior Court of Richmond County, Georgia, and responsive pleadings have been filed in that court by the appellee. This appeal has been set down for hearing on January 22, 1951.

2

When this Court by its order of February 20, 1950, in effect directed the appellant to assert its state remedies with all convenient speed it hardly intended the State Courts of Georgia to pass upon issues which had already been foreclosed by its own decision in Wright v. Georgia Railroad & Banking Co., 216 U. S. 420. Appellant is not justified in assuming that the order of continuance was improvidently entered without cognizance and awareness of the binding force of the judgment of the three-judge District Court in Ga. Railroad and Banking Co. v. Redwine, 85 F. Supp. 749. There is no reason why the Courts of the State of Georgia are better qualified than this Court to determine whether or not the case is to be ruled by the principle of res judicata. The order of continuance should, therefore, be construed as necessarily and intentionally giving to the judgment of the District Court just exactly the scope and meaning which appellant now attributes to it (Appellant's motion, pages . 1 and 2).

Appellant insists that there are no unsettled questions of state law necessary to a decision of this case. Appellee has briefed and argued in this Court matters which rest wholly upon state law, including interpretation of certain provisions of the several Constitutions' of the State of Georgia. Responsive pleading in the case now pending in the Superior Court of Richmonds County, Georgia, on appeal from the decision of the State Revenue Commissioner raise like issues (Appendix p. 17 et seq). An examination of this ground of the motion discloses that appellant makes no claim that issues depending upon state law have not been raised. but rather contends that they have been "settled." It is insisted that the decision of the Supreme Court of Georgia in State of Georgia v. Georgia Railroad & Banking Co., 54 Ga. 423 "settles" the questions of validity and construction of its charter as a contract of exemption. It is a matter of state law to determine just how far that decision "settles" these issues. Appellee intends to insist in the State Court that as a matter of state law an adjudicaion as to liability to taxation for one year is not res judicata upon an identical issue for a subsequent year. In Wright v. Georgia Railroad & Banking Cos, 216 U. S. 420, this Court referred to and followed this principle of state law. Appellee also contends that the opinion in State of Georgia v. Georgia Railroad & Banking Company. 54 Ga. 423, went beyond the issues there before the court. For example, the Supreme Court of Georgia there expressed the view that the legislature of Georgia in 1833 had constitutional authority to enter into a contract granting perpetual tax exemption. The record before that court, which has been included in full in the record in the case at bar, clearly shows that

no issue had been made with respect to the constitutional authority of the Georgia Legislature so to contract. It is therefore open to the Courts of the State of Georgia not only to determine that this issue is not settled but that the decision in question is not precedent or authority for decision of this question.

4

Appellant has heretofore argued and now continues to insist that the remedy being pursued in the State Couft will not afford it an efficient and speedy adjudication of the merits of the controversy. It expresses the fear that the appeal will be dismissed by the State Court on its own motion. If the appeal is dismissed for want of jurisdiction such dismissal will certainly be by the State Court upon its own motion as appellee has not questioned jurisdiction and has stated through counsel at the bar of this court that the remedy is appropriate and available and that jurisdiction exists. In brief previously filed by appellee at pages 33, 34, 35 and 36 we have endeavored to show that the appellant's fear of dismissal is without substance. We reiterate this argument upon this ground of the motion.

From 1937 to 1943 there was clearly a right to administrative determination of this question of taxability by the Georgia Board of Tax Appeals. (Appellee's brief, Appendix, pp. 64-65.) By Act of February 17, 1943, the Board of Tax Appeals was abolished and the State Revenue Commissioner required to decide all questions previously determined by the Board of Tax Appeals. (Appellee's brief, Appendix p. 66.) By section 19 of that same act provision was made for arbitration of valuations assessed by the Revenue Commissioner on certain tax returns including those of appellant. Admittedly, arbitrators should not concern

themselves with passing upon the question of taxability. Columbus Mutuol Life Insurance Co. v. Gullat, 189 Ga. 747. When this section 19 is construed as a whole it is clear that the only exception which the legislature sought to make in the procedure for review of tax questions is that having to do with valuation of property for which it provides an alternative procedure.

5.

Appellant's unsuccessful effort to obtain a declaratory judgment in Musgrove v. Georgia Railroad & Banking Co., 204 Ga. 139, furnishes no reason for terminating the continuance. The refusal of the Supreme Court of Georgia in that ease to point out the correct remedy was entirely proper.

The delay in obtaining a final adjudication of the issues has, in the main, resulted from appellant's efforts extending from October 15, 1945, to February 20, 1950, to secure a declaration of rights as against the State of Georgia, without the consent of that State, and in a manner which would extend largely beyond the tax claims then in controversy. Even apart from the fact that the delay is largely chargeable to appellant, there has been no injury to it, irreparable or otherwise, resulting from this lapse of time. Should the railroad be found ultimately liable to taxation the principal amount of its tax liability would be the same whenever the decision should be made. Interest is but compensation for the use of these tax funds pending litigation. Should the ultimate decision be in favor of the appellant, then there will most certainly be no injury resulting from the delay incident to litigation.

CONCLUSION

Wherefore, appellee urges that motion to terminate the continuance and decide the appeal be denied and that the State Courts of Georgia be allowed to pass upon the issues there pending.

Respectfully submitted,

201 State Capitol EUGENE COOK
Atlanta, Georgia • Attorney General of
Georgia

201 State Capitol M. H. BLACKSHEAR, JR., Atlanta, Georgia Deputy Assistant Attorney General

924 Healey Building DORSEY, Atlanta, Georgia Of Counsel

Counsel for Appellee
Irwinton, Georgia VICTOR DAVIDSON

Counsel for Amici Curiae

GEORGIA, Fulton County

In person appeared before the undersigned officer authorized to administer oaths, M. H. BLACK-SHEAR, JR., who, being sworn on oath says that he is of counsel for appellee in the above case and has personal knowledge of the facts stated in the foregoing answer to motion to terminate the continuance and decide the appeal, and that the facts set out in such answer are true.

M. H. BLACKSHEAR, JR.

Sworn to and subscribed before me this 28th day of December, 1950 BETTY BALCOM Notary Public

APPENDIX

DEPARTMENT OF REVENUE
State of Georgia
Atlanta

May 26, 1950

Mr. Sherman Drawdy, President Georgia Railroad and Banking Company Augusta, Georgia

Dear Sir:

Re: State, County and Local Ad Valorem Taxes, Georgia Railroad and Banking Company, for 1939 through 1950

At the request of this department, you have heretofore filed ad valorem tax returns covering the real
and personal property and franchise included in those
returns identified as Main Line and Athens Branch
of the Georgia Railroad and Banking Company for
each of the years 1939 through 1950, inclusive. We
understand the position uniformly taken by the Railroad Company as to each of these years that this
property was not subject to ad valorem taxation, but
instead was subject to taxation upon the net returns
on your capital stock at the rate of one-half of one per
cent.

This is to inform you that this department does now, and hereby, take the following actions with respect to ad valorem taxation for the years in question:

1. The valuations set forth by you in your returns for each of the years in question are acceptable as follows:

Aggregate value of this property as identified above for the year—

1939	\$2,845,	661
1940	2,928,	446
1941	3,015,	765
1942	3,141,	313
1943	3,267,	202
1944	3,444,	179
1945	3,554,	163
1946	3,616,	971
1947	3,629,	019
1948	3,624,	861
1949	3,673,	601
1950	3,891,	563

- 2. All of the property included in the returns making up the valuations set out in Paragraph One is determined to be subject to State, County, Municipal and School District taxation at the same rate of taxation as all other property similarly located for each of the years in question.
- 3. That liability for ad valorem taxes, as above set out, does relieve the company of liability for taxation for the years in question at the rate of one-half of one per cent of net earnings, and that appropriate adjustments for amounts heretofore paid by the company in lieu of ad valorem taxes be made.

The foregoing determination as to valuation and taxability shall become final unless written protest is

filed with the Commissioner within thirty days after the giving of this notice.

Yours very truly,

CHARLES D. REDWINE, COMMISSIONER
By W. Harvey Atkinson, Director
Property & License Tax Unit

WHA:MHB:rm

cc Hon Eugene Cook, Attorney General

cc .Mr. Victor Davidson

cc Mr. Furman Smith, C/o Smith, Kilpatrick, Cody, Rogers & McClatchey

IN RE: ASSESSMENT OR LEVY OF TAXES AGAINST GEORGIA RAILROAD AND BANKS ING COMPANY FOR THE YEARS 1939 THROUGH 1949.

The protest of Georgia Railroad and Banking Company, hereinafter called "Taxpayer," to the finding of the State Revenue Commissioner, dated May 26, 1950, in which the Commissioner found said company liable for State, County, Muunicipal, and School District taxation as all other property similarly located for each of the years in question, came on for a hearing on July 12, 1950. Upon request for a fuller statement by the Commissioner, counsel for taxpayer made the following stipulation which is to be incorporated in the protest:

1

That the branch of the railroad running from the main line to Eatonton, as provided by the Acts of 1833 and 1835, was never built.

That the branch of the railroad, as provided by the Act of 1833, running from Athens to some point on the Tennessee River, or as provided by the Act of 1835 to connect to the Cincinnati road, was never built.

After considering the argument and brief filed, it is hereby ordered as follows:

It appearing that an injunction was granted on October 15, 1945, to the said taxpayer against the then State Revenue Commissioner, and his successors in office, enjoining him from assessing or levying any ad valorem taxes against taxpayer on what is known as the main line running from Atlanta to Augusta and the Athens branch running from Union Point to the City of Athens, Georgia, and also a petition for a second injunction filed in the Federal Court on February 14, 1949, upon which an injunction pending the appeal was granted taxpayer on October 3, 1949, has tolled the seven year statute of limitations so that the taxes should be levied from 1939 to 1949, inclusive. The taxes due the State, the Counties, Municipalities and School Districts, through which said railroad runs, are hereby levied upon the tax returns filed by said taxpayer according to the levies of taxes made by the various taxing subdivisions for the particular years, all as set forth in the schedule hereto attached.

Dated this 21st day of September, 1950.

CHARLES D. REDWINE State Revenue Commissioner

COUNTY	1939	1940	1941 *	1942	1943	1944	1945	1946	· 1947	1948	1949	TOTALS
Fulton	5,837.39	6,608.87	6,235.02	6,545.79	6,834.44	7,307.90	7,600.59	10,433.80	12,278.37	12,277.90	12,467.31	93,827.38
DeKalb	4,404.81	4,829.87	4,986.60	5,200.20	5,399.28	6,115.94	6,204.99	7,845.48	7,929.46	8,968.82	9,093.22	70,978.67
Rockdale	1,550.89	1,588,06	1,637.78	1,653.81	1,703.47	1,803.84	1,919.95	1,944.85	1,955.77	-1,955.31	2,566.61	20,280.34
Newton	1,570.91		1,658.62	1,711.78	1,776.78	1,855.82	1,909.87	1,934.64	1,940.37	1,918.59	2,919.12	20,806.32
Walton	1,821.14	2,009.97	2,180.49	2,252.21	1,914.43	2,222.96	2,312.78	3,193.95	3,194.03	3,574.11	3,625.29	28,301.36
Morgan	3,814.68	3,906.53	4,019.00	4,144.35	4,315.37	4,536.81	4,683.57	4,749.63	4,752.93	6,835.70	6,426.46	51,685.03
Greene, Main Line		2,693.46	2,775.02	2,863.00	. 3,462.91	3,675.24	3,804	3,858.78	3,860.79	3,859.87	4,754.10	38,208.00
Greene, Athens Br	603.35	616.38	635.64	652.76	758.70	704.13	811.50	822.05	823.21	823.00	1,007.93	8,338.65
Oglethorpe	2,385.24	2,436.08	2,488.31	2,576.96	2,676.68	2,814.90	2,896.52	2,936.15	2,938.34	2,937.62	2,979.71	30,066.51
Clarke	1,074.19		1,193.80	1,144.76	1,089.62	1,129.18	1,168.71	1,399.11	1,615.25	1,717.22	1,741.82	14,422.68
Taliaferro	1,488.44		1,306.23	1,344.89	1,396.91	1,469.77	1,513.12	1,532.74	1,686.06	1,686.82	1,710.98	16,660.16
Warren	2,417.86	2,986.40	3,077.28	3,162.21	3,334.70	3,545.53	3,128.12	2,674.30	2,707.04	2,710.64	3,436.84	33,180.92
McDu_ie	2,626.88		Carrier Contract Cont	2,842.58	2,952.59			3,241.04	3,276.80	3,939.52	3,995.30	34,631.52
Columbia	1,148.54	1.176.03	THE PARTY AND TH	1,431.29	1,806.94	1,911.16	1,962.23	1,988.10	1,989.85	1,991.06	2,524.49	19,134.21
Richmond	3,327.12		3,484.98						4,011.97	3,979.01	4,716.20	42,974.71
TQTALS	36,671.91	38,626.14	39,636.06	41,263.03	43,301.15	46,311.91	47,275.99	52,809.46	54,960.24	58,675.19	63,965.38	523,496.46
STATE TAX	14,228.31	14,642.23	15,078.83	15,706.57	16,336.01	17,220.90	17,770.82	18,084.86	18,145.10	18,124.31	18,368.01	183,705.95

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COUNTY WIDE	1939	1940	1941	1942	1943	1944	1945₹	1946	1947 .	1948	1948	TOTALS
					MA SASS	N.						
Fulton	1 999 90	1,251.74	1,293.03	1,349.27	1,400,94	1,488.77	1,508.98	3,814.26	4,872.07	4,832.11	4,898.53	27,932.59
DeKalb	1,222.89 456.15	467.08	481.70	486.42	501.02	530.54		1,716.05	1,725.68	2,070.32	2,099.95	11,946.64
Rockdale	813.15	833.35	859.64	889.24	923.81	965.07	991.72	3,143.79	4,608.37	4,556.66	4,621.94	23,206.74
Newton		251.68	260.38	269.00	279.46	292.69	902.04	913.73	913.76	913.53	926,61	6,166.96
Walton	244.08	1,123.72		1,190.23	1,238.50	1,303.04	Professional Contract of the C	4,079.72	6,654.10	6,65249.	6,747.78	34,464.58
Morgan		947.96	976.48	1,001.70	1,046.91	1,113.28		3,496.49		3,501.03	3,551.18	21,203.61
Greene-Main Line		256.83	264.85	271.99	270.97		289.82	· C.	882.02	881.79	889.35	5,419.84
Greene-Athens Br	251.40	812.03	829.44	858.99	892.23	938.30		1,957.43	1,958.89	2,937.62	2,979.71	15,925.22
Oglethorpe	795.08	162.97	167.71	173.56	180.28	189.80			474.48	590.48	598.95	3,292.96
010110	159.53	635.09	653.12	672.45	698.46	734.89		1,226.19	1,532.78	1,686.82	2,333.16	11,549.71
Idnatorio	620.19	1,066.57	1,099.03	1,129.36.	1,190.96		. 1,303.39	2,674.30	2,707.04	2,710.64	4,124.21	20,279.20
Warren	1,007.44	897.82	917.59	947.53	984.20	1,037.01	1,066.52	2,160.69	2,184.53	3,282.93	3,329.42	17,683.87
McDuffie	875.63		669.18	715.65	752.89		2,452.79.		2,487.32	2,488.83	2,524.49	16,664.03
Columbia	638.0	5,301.32	5.415.28	5,812.24	6,032.95	6,249.97			8,023,95	7,958.02	10,847.26	76,711.44
Richmond	5,175.52	F. 1	0				. 3				- 6	9.00
TOTALS	14.272.60	14,661.51	15,043.12	15,767.63	16,393.58	17,185.99	24,079.31	36,980.98	42,526.86	45;063.27	50,472.54	292,447.39

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CITIES	1939	. 1940	1941	1942	1943	1944	1945	q ¹⁹⁴⁶	1947	1948	1949	TOTALS
Atlanta	6,885.57	7,083.60	7,342.90	7,695.12	8,030.56	8,575.33	8,910.13	7,585.89		, 9,172.51	9,313.12	89,769.75
Decatur	432.93	442.64	458.57	484.01	485.50	535.92	537.59	635.30	689.80	684.89	694.70	6,081.85
Clarkston	48.48	82.26	85.43	91.22	94.50	100.93	100.61	135.89	The state of the state of the state of	• 50.12	50.84	952.03
Stone Mountain	324.87	332.00	. 345.71	373.31	387.35	419.00	411.33	416.67	416.69	416.04	415.52	4,259.49
Lithonia	303.05	310.04	325.09	352.82	365.94	398.29	387.26	386.16	593.10	592.95	599.82	4,614.52
Conyers	464.72	502.47	522.98	504.66	508.23	548.07	632.66	607.14	.584.27	584.15	592.52	6,051.87
Covington	531.31	544.29	557.55	568.95	588.04	609.41	636.16	337.55	337.56	409.06	414.93	5,534.81
Social Circle	0 575.54	. 589.90	752.59	777.18	807.47	841.78	888.05	9.00.70	900.72	1,125.64	1,141.76	9,301.33
Rutledge	186.95	191.43	197:06	204.10	213.11	208.25	340.37	314.39	314.40	314.32	318.83	2,863.21
Madison	522.72	535.38	551.94	573.66	599.87	836.94	874.78	893.22	893.24	669.77	905.80	7,857.32
Greensboro	502.19	522.95	539.36	555.83	569,54	597.92	624.45	637.86	634.70	634.55	643.62	6,462.97
Union Point, Main L	410.23	216.94	223.76	231.17	232.44	251.03	394.43	399.54	532.73	532.59	540.23	3,965.09
Union Point, Ath. Br.	94.07	48.87	49.92	51.60	53.23	56.21	86.80	87.92	.117.24	117.20	118.88	881.94
Crawfordville	154.49	158.28	163.27	169.03	175.61	183.66	189.59	182.06	230.46	230.40	233.70	2,080.55
Norwood	107.95		118.62	121.87	128.07	136.02	139.83	141.64	141.65	212.43	215.48	1,463.56
Camak, Main Line	302.50	347.61	361.50	370.26	396.37	431.08	441.96	490.50	517.85	517.73	525.14	4,702.50
Thomson	259.60	269.46	270.74	274.47	349.25	371.68	324.25	358.32	468.15	472.83	479.60	-3,907.35
Harlem	181.94	186.31	191.72	197.97	221.51	239.02	293.94	297.32	297.32	297.25	301.51	2,705.63
Augusta	5.141.18	5,926.07	5,777.31	6,156.02		6,259.28	6,498.74	7,007.57	7,006.27	6,995.63	10,760.83	73,916.91
Crawford, Athens Br.	244.71	THE RESERVE OF THE PARTY OF THE		262.87	273.37	285.89	294.16	297.95	297.95	297.88	802.15	3,060.46
Athens, Athens Br	862.31	935.41	9990.93	1,092.33		1,180,85		1,225.53	1,226.57	1,223.30	1,240.81	12,321.87
	210 E97 91	10 475 91	90 081 08	91 118 97	99 001 97	23 156 56	24.186.92	23 349 12	25,485,44	25,551,24	29,809.79	252,753.01

SCHOOL DISTRICT	COUNTY	1939	1940	1941	1942	1943	1944	1945	1946	1947	1948	1949	TOTALS
Avondale	DeKalb	233.57	239.12	329.49	342.88	355.54	. 271.72	289.03	39,04	44.05	93.18	47.62	2,285.24
Clarkston	DeKalb	347.02	355.29	365.42	376.56	391.11	406.96	424.03	58.57	73.27	109.77	74.23	2,982.24
Stone. Mtn.	DeKalb	* 549.36	462.83	4773.93	800.93	831.60	868.50	901.89	266.32	152.19	304.16 .	230.09	6,241.30
Redan	•DeKalb	.228.78	234.39	: 337.76	348,03	309,86	326.21	335.91	170.13	28.36	141.74	115.02	2,576.19
Lithonia	DeKalb	344.30	352.02	364.60	380.76	395.21	293.65	856.58	385.03	261.50	261.53	176.63	4,171.90
Totals		19703.04	1,743.65	2,171.20	72;249.16	2,283,32	2,267.04	2,806.94	919.09	559.46	910.38	643.59	18,256.87
None :	Rockdale										•		
None	Newton		()		*	^						N	
None	Walton			0.10.00	No de participados	007.54	207.00	70.04	90.07	60.07	90.05	82.11	951461
Rutledge	Morgan	325.61	333.42	342.86	353.16	367.54	387.08	79.04	80.97	80.97	80.95	02.11	2,514.61 8,944.83
Buckhead	Morgan	1,306.70	926.50	1,271.00	1,418.26	1,475.92	1,552.32	246.15	2 249.34	243.35	249.29	7	
Totals Main Line		1,632.31	1,259.92	1,613.86	1,771.42	1,843.46	1,939.40	326.09	830.31	330.32	330.24	82.11	11,459.44
Meadow Cres	Greene	175.55	. 180.69	187.37	192.33	199,59	209.58	216.21	0	T	1		1,361.32
Siloam	Greene	662.19	685.84	105.18	726.51	752.41	798.41	2413.01			MARKAR		4,743.55
Union Point	Greene	643.15	668.82	883.57	912.68	946.36	1,014.26	1,052.51	236.92	237.50	237.44	240.84	7,074.05
Totals	Taliaferro	1,480.89	1,535.35	1,776.12	1,831.52	1,898.56	2,022.25	1,681.73	236.92	237.50	237.44	240.84	13,178.92
Barnett	Warren	341.27	476.75	378.35	636.55	666.17	139.50	143.42		·			2,772.01
Norwood	Warren	216.81	222,96		236.20	245.70	258.59	266.02					1,675.56
Camak	Warren	493:19	521.72	449.97	462.70	486.35	517.87	531.79	537.80	554.15	554.02	561.95	5,671.51
Totals		1,051.27	1,221.43	1,047.60	1,335.45	1,398.22	915.96	941.23	537.80	554.15	554.02	561.95	10,119.08
Thomson	McDuffie	The state of the s	1,294.68	1,327.78	1,230.93	1,278.55	1,349.98	1,389.21	812.72	317.49	318.33	322.82	10,405.40
Dearing	McDuffie	465.42	477.24	489.03	503.04	522.53	552.22	566.67	114.80	114.81	114.78	116.42	3,036.96
Totals		1,728.33	1,771.92	1,816.81	1,733.97	1,801.08	1,902.20	1,955.88	427.52	432.30	433.11	439.24	14,442.36
Harlem	Columbia	220.41	225.69	385.42	409.64	430.18	455.42.	. 187.11	94.73	94.88	95.00	296.35	2,694.83
Grovetown	Columbia	270.73	277.21	283.77	304.81	321.41	340.90						1,798.8
None	Richmond	491.14	502.90	669.19	714.45	751.59	-796.32	187.11	94.73	94.88	95.00	96.25	4,493.60

Athens Branch				•		115		14			•	
	125.54 382.15	128.19 390.48	170.69 401.38	175.98 396.06	183.97 391.82	.° 193.01 411.17	-199.42 425.53	44.89 261.45	44.89 252.03	44.88 251.97	45.52 72:35	1,356.78 3,636.39
Maxeys Oglethorpe	507.69 346.76 495.65	518.67 354.13 506.44	572.07 362.18 517.03	572.04 374.38 539.18	575.79 388.82 560.17	604.18 - 410.00 589.94	624.95 421.54 607.11	306.34	296.92 307.77	296.85	117.87	4,993.37 2,657.81 4,431.07
Arnoldsville Ogleth'pe	299.14 47.40	305.34	7 312.85	323.65	336.14	354.19	364.44				:/	2,295.75 47.40
Totals 1,	,188.95	1,165.91	1,192.06	1,237.21	1,285.13	1,354.13	1,393.09	307.78	307,77		/-	9,432.03

GEORGIA RAILROAD AND BANKING COMPANY.

MAIN LINE AND ATHENS BRANCH .

TAXES DUE 1939-1949, Inclusive

· STATE	\$183,705.95
COUNTY	523,496.46
COUNTY WIDE	292,447.39
CITIES :	252,753.01
SCHOOL	
DISTRICTS	86,375.73

1,338,778.54

GEORGIA RAILROAD AND BANKING COMPANY

STATE TAXES INCOME 1/2 of 1%

Net Earnings

1939	. 1938	3,799.93
1940	1939	4,704.68
1941	1940	5,008.08
1942	1941	8,700.91
1943	1942	19,990.18
1944	1943	20,234.09
1945	1944	17,140.62
1946	1945	8,057.19
1947	1946	2,829.12
1948	1947	6,149.68
1949	1948	9,321.29
		105,935.77
1050 2	1840	7 900 47

7,382.47

113,318.24

NO.

IN THE SUPERIOR COURT OF RICHMOND COUNTY, GEORGIA

CHARLES D. REDWINE, as State Revenue Commissioner, Appellee,

VS.

GEORGIA RAILROAD AND BANKING COMPANY, Appellant

On appeal from the assessment and levy of ad valorem taxes and denial of protest.

NOW COMES CHARLES D. REDWINE, as State Revenue Commissioner, herein referred to as Appellee, and brings this his general and special demurrers to the protest of Appellant and the allegations set forth herein.

GENERAL DEMURRER

Appellee demurs generally to the said protest and the allegations set forth therein and says:

1.

That the allegations set forth in said protest constitute no legal defense to the assessment and levy of taxes against appellant.

2

The appellant in its protest bases its claim of exemption to the taxes assessed and levied upon Section 15 of the Act of the Legislature of 1833, and appellee says that said Section is unconstitutional and the pro-

test should be dismissed and the prayers therein denied, for the following reasons, to-wit:

- (a) The portion of Section 15 of the Act of 1833 relied on by appellant is repugnant to and in conflict with the Constitution of the State of Georgia of 1798, which Constitution was in force at the time of said Act, because the General Assembly of Georgia at that time had no power to grant perpetual tax exemption to any person, or to bind all future legislatures from changing any law enacted, and contract away the sovereign power of taxation of the State of Georgia so that the people of Georgia could never recover this sovereign power.
- (b) The said portion of Section XV is in conflict with Section XXII, Article I of the Constitution of 1798, which reads as follows:

"The General Assembly shall have power to make all laws and ordinances which they shall deem necessary and proper for the good of the State which shall not be repugnant to this Constitution."

because this provision of the Constitution limits the General Assembly to the passage of those laws which are not repugnant to this Constitution, either according to the letter or according to the spirit. An alienation of the sovereign power of the State is repugnant to the sovereign rights of the people of Georgia which was retained by the Constitution.

(c) Said Section of the Act is further repugnant to said Section of the Constitution because said section, if held valid, would forbid all future legislatures from enacting any law under the provisions of said section of the Constitution withdrawing the grant

of said element of sovereignty over a part of the territory of Georgia because under said provision of the Constitution the General Assembly of any year had power to enact any law coming under the provisions of said Section of the Constitution, unhampered by what a preceding legislature had done, and the legislature was not forbidden the right to levy tax on all property within its jurisdiction.

- (d) The said portion of Section XV is further repugnant to the Constitution of 1798 and in conflict with Section XXIII of Article I, which limits the authority of the General Assembly and declares the rights of the people in the following words:
 - "... and this convention composed of the immediate representatives of the people chosen by them to assert their rights, and to revise the powers given by them to the government, and from whose will all ruling authority of right flows, doth assert and declare the boundaries of this State to be as follows... (giving the boundaries of Georgia). Including and comprehending all the lands and waters within the said limits, boundaries and jurisdictional rights."

for the reason that:

- (1) Said portion of Section XV is an alienation of the sovereignty of the State over said Georgia Railroad Company:
- (2) Said portion of Section XV is an attempt by one legislative body to preempt the right and prerogatives of succeeding legislatures; and
- (3) Said quoted portion of the Constitution reserved to the people of the State the jurisdictional rights, including the right to tax, over the Georgia

Railroad Company, and said Section XV was and is in violation of said jurisdictional rights.

This exemption provision, set out in Section XV of the Act of 1833, is especially repugnant to the following portion of said Section XXIII of Article I of the Constitution of 1798:

"And this convention doth further declare and assert, that all the territory without the present temporary line and within the limits aforesaid, is now of right the property of the free citizens of the State, and held by them in sovereignty, inalienable but by their consent."

because this alienation of an essential element of sovereignty is in direct conflict with this provision of the Constitution because only the free citizens of Georgia had the power to alienate this portion of the sovereignty of the State, and the legislature had no power to bind the free citizens of Georgia to such a contract of alienation of sovereign powers.

- (e) The granting of this portion of the sovereignty of the State of Georgia by the legislature is further prohibited by said Section XXIII of said Article wherein, after authorizing the legislature to convey to the United States government the western territory of the State, the legislature is authorized as follows:
 - ". . . and may procure an extension of settlement, and an extinguishment of Indian claims in and to the vacant territory of this State, to the east and north of the said river Chattahoochee, to which territory such power of contract or sale by the Tegislature, shall not extend."

This alleged grant of the element of sovereignty to

said Georgia Railroad Company was over territory to which the power of the legislature to contract did not extend, and was indeed forbidden.

(f) The caption of said Act of 1833 reads as follows:

"An Act to incorporate the Georgia Rail Road Company, with powers to construct a Rail or Turnpike Road from the city of Augusta, with branches extending to the town of Eatonton, Madison, in Morgan County, and Athens, to be carried beyond those places, at the discretion of said company, to punish those who may wilfully injure the same, to confer all corporate powers necessary to effect said object, and to repeal an act entitled 'An Act to authorize the formation of a company for constructing a Rail Road or Turnpike from the city of Augusta to Eatonton, and thence westward to the Chattahoochee River, with branches thereto, and to punish those who may injure the same'."

The granting of the portion of the sovereignty of the State of Georgia to said corporation, as set out, is a matter different from what is expressed in the title and by reason of same is repugnant to Section XVII, Article I of the Constitution of \$798 which forbids the General Assembly to enact such Acts, towit:

"nor shall any law or ordinance pass containing any matter different from what is expressed in the title thereof."

Not merely is it repugnant to the letter of the Constitution, as set out above, but it is repugnant to the spirit of the Constitution of 1798 in that the provision

is hidden in the main body of the Act at the end of the Fifteenth Section where the average legislator would not be expecting to find such a provision, and by so being placed and not referred to in the title contravenes the very purpose for which the Constitution of 1798 was created, to-wit: the prevention of another infamous Yazoo Fraud, which had once been enacted by the General Assembly of Georgia by means of concealment in the body of an Act, matter to which reference was not made in the title; that underlying the spirit of the Constitution, the moving factor which caused the insertion of Section XVII of Article I in the Constitution of 1798 was the desire of the Constitution-makers to prevent surreptitious legislation, of which the title to an Act gave no notice.

3.

Appellee says further, that said protest should be dismissed because Section 23 of Article I of the Constitution of 1798 as set forth in the extracts above retained to the people of the State all the powers of sovereignty over its territory, and by reason of said retention, reserved to the people the power to adopt constitutions which would revoke any law that the legislature might pass which would attempt to alienate the State's sovereign power, and in both the Constitution of 1877 and that of 1945, the people of Georgia as authorized by the 14th Amendment to the Federal Constitution which forbids any State to deny any. person the equal protection of the laws, adopted a Constitution which would give all persons the equal protection of the law relating to ad valorem taxes, and voided any laws which the legislature had heretofore made attempting to alienate the sovereign power of taxation, and the portion of said Section 15 of the

Act of 1833 is in conflict with the Constitution of 1877 and of 1945. It is in conflict with Paragraph I, Section I, Article 4 of the Constitution of 1877, which reads as follows:

"Taxation, a sovereign right. The right of taxation is a sovereign right-inalienable, indestructible—is the life of the State, and rightfully belongs to the people in all Republican governments, and neither the General, nor any, nor all other departments of the Government established by this Constitution, shall ever have the authority to irrevocably give, grant, limit, or restrain this right; and all laws, grants, contracts and all other acts, whatsoever by said government, or any department thereof to effect any of these purposes, shall be and are hereby, declared to be null and yoid for every purpose whatsoever; and said right of taxation shall always be under the complete control of, and revocable by, the State, notwithstanding any gift, grant, or contract, whatsoever, by the General Assembly."

It conflicts with Article I, Paragraph 3, Section 3 of the Constitution of Georgia of 1945, which reads as follows:

"Revocation of tax exemptions. All exemptions from taxation Reretofore granted in corporate charters are declared to be henceforth null and void."

4.

The said section is also in conflict with the Fourteenth Amendment to the Constitution of the United States, which provides:

... nor shall any State . . . deny any person

within its jurisdiction the equal protection of the law."

This section provides special benefits to the appellant, and denies to all the other property owners of the State the equal protection of the laws which require all property owners to bear their equal share of the burdens of government, in that all property owners in the counties, school districts, municipalities along the entire right-of-way of said railroad, are forced to bear more than their fair share of expenses of government, including the cost of protection of the property of appellant, expenses of court in which it litigates, the cost of schools and other improvements, all of which equal protection of the law was attempted to be provided by the vote of the people of Georgia in the Constitution of 1945, in which all tax exemptions were revoked.

5.

Appellee further says that the construction placed on said Section 15 by the courts, as set forth in Paragraphs 4 and 5 of the protest, are likewise in conflict with the same Constitutions, in the same manner and for the same reasons as set forth in the preceding paragraph of this demurrer.

6.

The General Assembly in enacting the Act creating the appellant did not intend in said act to grant perpetual tax exemption on all the property which the corporation should have then or possess later, but the wording of the act shows that it intended merely to grant tax exemption on the shares of stock in the hands of the stockholders.

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7.

The protest with the amendment stipulated by the appellant as set forth in the final finding of the appellee shows that even though the Act of 1833 and the amending Act of 1835 which created the appellant should constitute a contract whereby appellant agreed to construct the railroads set forth in said acts, and as a consideration therefor should receive tax exemption forever, the appellant has failed to construct said railroads and hence the appellant has violated its material obligations under said contract and now has no right to any exemption until and unless it builds the roads specified in the Acts of 1833 and 1835.

SPECIAL DEMURRERS

Appellee demurs specially to said petition and its parts and for grounds of said special demurrer says:

1

Appellee demurs specially to paragraph 3 of the protest and says that said paragraph should be stricken because said section of the Constitution of Georgia of 1945 is not in conflict with the sections of the Constitution of the United States as set forth therein, and would not impair the obligation of any contract protected by same and neither worked it deprive any taxpayer of property without due process of law for the following reasons:

(a) The protest, as amended by the stipulations set forth in the final finding of appellee, admits that appellant has not built the railroads requested by the acts either specifically or impliedly, and the Acts of 1833 and 1835 creating said appellant clearly show

of said railroads, and by reason of these material violations of its obligations under said Acts is not entitled to have the State of Georgia comply with the obligations sought to be enforced, and hence has no contract which can or should be enforced and hence is not deprived of any rights under the 14th Amendment to the Constitution of the United States.

- (b) The people of the State of Georgia under the Constitution of 1798 of said State, in force at the time of the enactment of the Acts creating appellant, reserved to themselves the sovereign power and under said reservation of sovereignty had full power to enact the Constitution of 1945.
- (c) The people of Georgia had still the further power to enact a provision in said Constitution which constituted a withdrawal of any attempted exemption in both this Constitution and that of 1877 because the attempted exemption denied to all the other taxpayers of the State the equal protection of the laws as guaranteed by the 14th Amendment to the Constitution of the United States.

2

Appellee demurs specially to paragraph 4 and that part of paragraph 5 of protest which refers to the cases of Wright vs. Georgia Railroad and Banking Company, 216 U. S. 420, and State of Georgia vs. Georgia Railroad & Banking Co., 54 Ga. 423, and alleges that the judgments rendered therein are res judicata and conclusive on the State of Georgia, and for grounds thereof says:

(a) That the Exhibits "A" and "B" attached to the protest show that in the 1st of the above named cases the United States Supreme Court affirmed a judgment rendered by Judge Newman of the District Court for the Northern District of Georgia, and the pleadings fail to allege whether the judgment is still of force and binding against the State of Georgia, or whether it has been declared void as against the State of Georgia by the same District Court, and neither does the pleadings allege whether the Supreme Court of Georgia has adjudged said case not res judicata as against the State of Georgia, and in order for this court to know the particulars appellant should be required to so allege.

- (b) The record in the said case shows that it was an action against Wright as an individual and not in the official capacity as a State official,
- (c) The Supreme Court of the United States in the same case holds that the decision rendered in the second of the above cases is not res judicata.
- (d) The second of said cases is not res judicata because judgments relative to taxes for one year are not res judicata as to taxes for years other than the one involved in the litigation.
- (e) The Appellee is acting in a dual capacity in the present case, first as the official for the assessing and levying of State taxes, and second as the duly constituted official charged with the duty of assessing or levying the amount of taxes which the municipal and county corporations, through which the railroad of appellant runs, has levied. In the case in the 54th Georgia, set forth above, none of the municipal and county corporations were parties, nor were their right to tax decided, neither was the Comptroller-General acting for them, for at that time although they had

\$ C.

been granted the power to levy ad valorem taxes on all the property within their borders, no machinery for the levying and collecting had been provided by the legislature. In the first of said cases the exhibit of said case shows that none of them were legally before the court, and no judgment involving their rights was rendered.

3

Appellee demurs specially to that portion of paragraph 5 of the protest which alleges that the case of Wright v. Georgia Railroad and Banking Company, 216 U. S. 420, is res judicata against the municipal and county corporations and says that the judgment in that case is void as to, and not binding on any of the municipal and county corporations included in the assessments of appellee, nor is it valid or binding on those counties which intervened in said action because the laws of Georgia at the time did not authorize any counties to be made defendant in such suits, even on their own motion, and did not grant any person the right to suit for declaratory judgment against a county or to obtain by court action a judgment on the question of the right of counties to collect such taxes, the only provision for any such litigation for the determination of the collectibility of such taxes being by affidavit of illegality in the Superior Court, and the only suits which a person could maintain against a county were those specifically provided by statute.

Appellee demurs specially to the remainder of paragraph 5 of the protest and shows that same constitutes no defense to the levying of these taxes and neither do

they show that the State was bound by the litigation in the Wright case described above.

5.

Appellee demurs specially to paragraph 5 of the protest and says that said paragraph as a whole sets forth no defense nor any legal reason why appellant should be exempt from payment of the taxes in question to the State, and no reason why it should be exempt from taxes to the taxing subdivisions.

6.

Appellant demurs specially to paragraph 6 of said protest and to the exhibits "C," "D" and "R," and says that the allegations set forth therein to the effect that certain named Attorneys General and Assistant . Attorneys General had ruled that the exemption pleaded was an irrevocable contract. Appellee says that both the paragraph and the said exhibits should be stricken because same constitutes no reason why appellant should be exempted from the payment of the taxes sought to be collected herein, and their opinions relative thereto is not law. It will also be noted that at least one of the opinions, to-wit, B. B. Zellars referred to the Income Tax exemption, and both the Supreme Court of Georgia and the Supreme Court of the United States have overruled him on that opinion and held that this section constituted no income tax exemption.

7.

Appellee demurs specially to paragraph 7 of the protest and says that same should be stricken because it sets forth no legal reason why appellant should be exempted from the payment of said taxes; that the

second, third and fourth sub-paragraphs under this head should be stricken because they are mere conclusions of the pleader without any law upon which to base them, because the general law of 1874, as well as the general laws authorizing counties and other subdivisions to tax, impliedly repeal all laws in conflict.

8.

Appellee demurs specially to paragraph 1 of the protest which claims that Section 15 constitutes a tax exemption for the entire line of railroads of appellant including that branch running from Madison, Georgia, to the principal city of Atlanta, Fulton County, Georgia, a distance of sixty-seven (67) miles, and says that even though said section should apply to all the other branches of said railroad, it would not apply to that portion running from Madison to Atlanta, Georgia.

9.

Appellee demurs specially to paragraph 8 of protest and says that same constitutes no exemption to the taxes due prior to 1945 because the Constitution of 1877 repeals any exemption previously granted by the General Assembly.

10.

Appellee further demurs to paragraph 1 of protest and says that Section 15 should not apply because that portion was built under the provisions of the Act of 1837, and the construction was allowed by the State as a privilege, and so stated in the Act, and no tax exemption was contracted therein. The only wording in said Act which could possibly be construed as in any way approaching the tax exemption was the grant-

ing in said Act of all the immunities in the construction of the railroad as was contained in the previous Acts. The only immunity, in the construction granted in the previous Acts was the immunity from injunction. The authority to build this 67 miles being a mere privilege, the State was authorized to withdraw at will any tax exemption which might have been included therein.

11.

Appellee demurs to the protest as a whole and says that same does not allege whether all of said branches of railroad of said corporation were constructed by a means of stock subscriptions or partly by the earnings of said railroad and by reason of said failure so to allege, this court cannot determine whether all of it was built by the proceeds of the sale of stock.

WHEREFORE, Charles D. Redwine, as State Revenue Commissioner, prays that this demurrer be sustained; that the protest be dismissed and judgment entered holding the Georgia Railroad and Banking Company liable for the taxes assessed.

EUGENE COOK, Attorney General of Georgia M. H. BLACKSHEAR, JR., Deputy Assistant Attorney General of Georgia

VICTOR DAVIDSON, Irwinton, Georgia, Employed as Special Attorney by parties at interest, Morgan, Oglethorpe, Greene, Warren, Clarke, McDufflie, Newton, Rockdale, Walton, DeKalb, Taliaferro and Columbia Counties.

JOS. G. FAUST, Greensboro, Georgia Attorney for Morgan, Oglethorpe and

- Greene Counties and the City of Greensboro, Georgia, and Union Point, Georgia.
- JOEL H. TERRELL, Warrenton, Georgia, Attorney for Warren County
- CARLISLE COBB, Athens, Georgia Attorney for Clarke County
- JAMES BARROW, Athens, Georgia Attorney for City of Athens
- J. GLENN STOVALL, Thomson, Georgia Attorney for McDuffile County
- C. C. KING, Covington, Georgia
 Attorney for Newton County
- W. S. NORTHCUTT, Atlanta, Georgia Attorney for Fulton County
- J. H. McCALLA and DEMPSEY W. LEACH Conyers, Georgia, Attorneys for Rockdale County
- A. M. KELLEY, and ROBERTS & ROBERTS Monroe, Georgia, Attorneys for Walton County
- JULIUS A. McCURDY, Decatur, Georgia
 Attorney for DeKalb County
 - A. F. JENKINS, Madison, Georgia County Attorney, Madison County and Attorney for Town of Rutledge, Georgia
 - OSGOOD O. WILLIAMS, Crawfordville, Ga.

 Attorney for Taliaferro County
 - J. F. HARDIN, Augusta, Georgia.
 Attorney for Columbia County

W. P. CONGDON, Augusta, Georgia Attorney for City of Augusta, Georgia Employed by parties at interest in the litigation. NO.

IN THE SUPERIOR COURT OF RICHMOND COUNTY, GEORGIA

CHARLES D. REDWINE, as State Revenue Commissioner, Appellee,

VS

GEORGIA RAILROAD AND BANKING COMPANY, Appellant.

On appeal from the assessment and levy of ad valorem taxes and denial of protest.

PLEA AND ANSWER OF APPELLEE

NOW COMES CHARLES D. REDWINE, as State Revenue Commissioner, the appellee in the above styled case, and in order that the issues involved in the within action may be clarified makes this his response to the allegations of the protest of the Georgia Railroad and Banking Company, and says:

1.

In answer to paragraph 1 of protest, appellee denies appellant's allegations that Section 15 of the Act of 1833 exempts the property herein sought to be taxed from ad valorem taxes.

2.

Appellee denies paragraphs 2 and 3 of the protest.

3.

Appellee admits paragraph 4 of the protest.

4.

Appellee denies paragraph 5 of the protest, as pleaded, and says that the judgment in the case of Wright v. Georgia Railroad and Banking Company, 216 U.S. 420, has since its rendition been held by the Supreme Court of Georgia as not res judicata against the State Revenue Commissioner of Georgia in the case of Musgrove v. Georgia Railroad and Banking Company, 204 Ga. 39, and has likewise been held not res judicata and not binding on this appellee by the District Court for the Northern District of Georgia in the case of Georgia Railway and Banking Company v. Redwine, adjudicated July 9, 1949, a copy of which judgment by a majority of the Court is included in the transcript of record of the case of Georgia Railroad and Banking Company v. Redwin, pages 170 to the end of said opinion on page 180, which by reference appellee attaches as his Exhibit "A."

5.

For further plea and answer appellee says that the plea of exemption from taxation of appellant should be denied for the reason that plaintiff is attempting to claim benefits from a charter granted by the State to it without complying with the requirements of the charter and performing the duties placed by said charter on said appellant, and by reason of said failure on the part of appellant to comply it is guilty of a breach of contract which precludes it from demanding any attempted tax exemption set forth in said charter. Appellee shows that the Act of 1832 and the Act of 1835 creating appellant required that appellant should construct a branch of railroad from its main line to Eatonton, Georgia, and likewise required appellant to

construct a line of railroad from Athens to the Tennessee River in the vicinity of Decatur, Alabama; that the construction and operation of these railroads were the main purposes for which appellant was created and granted special privileges. Notwithstanding this, appellant has never constructed either of these lines of railroad.

6

For further plea and answer appellee says that appellant's prayers should be denied in so far as they apply to that portion of the railroad from Madison,, Morgan County, Georgia, to Atlanta, Fulton County, Georgia, a distance of 67 miles, because that portion was built under the provisions of the Act of 1837, same being an amendment to appellant's charter, and the construction of this branch was allowed by the State as a privilege and so stated in the Act. and no tax exemption was contained therein. The only wording in said act which could possibly be construed as in any way approaching the tax exemption was in the granting in said act of all the immunities in the construction of the railroad as was contained in the previous Acts. The only immunity in the construction. granted in the previous Acts, was an immunity from injunction. The authority to build this 67 miles being a mere privilege, the State was authorized to withdraw at will any tax exemption which might have been included therein. Nearly all the cost of said branch of railroad was paid for with the net earnings of other portions of the railroad for the years 1843, 1844 and 1845 amounting to approximately \$440,000 and a bond issue of \$700,000, which was repaid with net earnings from the railroad and hence this branch should not be exempted.

WHEREFORE, having fully answered, Charles D. Redwine, as State Revenue Commissioner, prays judgment sustaining the assessment.

EUGENE COOK, Attorney General of Georgia M. H. BLACKSHEAR, JR., Deputy Assistant Attorney General of Georgia

- VICTOR DAVIDSON, Irwinton, Georgia Employed as Special Attorney by parties at interest, Morgan, Oglethorpe, Greene, Warren, Clarke, McDuffie, Newton, Rockdale, Walton, DeKalb, Taliaferro, and Columbia Counties.
- JOS. G. FAUST, Greensboro, Georgia Attorney for Morgan, Oglethorpe and Greene Counties and the City of Greensboro, Georgia, and Union Point, Georgia.
- JOEL H. TERRELL, Warrenton, Georgia Attorney for Warren County
- CARLISLE COBB, Athens, Georgia
 Attorney for Clarke County
- JAMES BARROW, Athens, Georgia Attorney for City of Athens
- J. GLENN STOVALL, Thomson, Georgia Attorney for McDuffie County
- C. C. KING, Covington, Georgia Attorney for Newton County
- W. S. NORTHCUTT, Atlanta, Georgia Attorney for Fulton County
- J. H. McCALLA and DEMPSEY W. LEACH Conyers, Georgia, Attorneys for Rockdale County

A. M. KELLEY, and ROBERTS & ROBERTS, Monroe, Georgia Attorneys for Walton County

JULIUS A. McCURDY, Decatur, Georgia Attorney for DeKalb County

A. F. JENKINS, Madison, Georgia County Attorney, Madison County, and Attorney for Town of Rutledge, Georgia

OSGOOD O. WILLIAMS, Crawfordville, Ga. Attorney for Taliaferro County

J. F. HARDIN, Augusta, Georgia Attorney for Columbia County

W. P. CONGDON, Augusta, Georgia Attorney for City of Augusta, Georgia Employed by parties at interest in the litigation.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

N8. 1

GEORGIA RAILROAD & BANKING COMPANY,
Appellant

1

CHARLES D. REDWINE, State Revenue Commissioner,
Appellee

Answer of Appellee to Motion of Appellant

o to Terminate Continuance and Decide Appeal

EUGENE COOK,
Attorney General of Georgia

M. H. BLACKSHEAR, JR.,
Deputy Assistant Attorney
General of Georgia

Counsel for Appellee

SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1951

No. 1

GEORGIA RAILROAD & BANKING COMPANY,

CHARLES D. REDWINE, State Revenue Commissioner, Appellee

Answer of Appellee to Motion of Appellant to Terminate Continuance and Decide Appeal

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Appelee, Charles D. Redwine, who is State Revenue Commissioner of Georgia, objects to and opposes appellant's motion to terminate the continuance ordered by this Court on February 20, 1950, and for cause thereof says:

1.

On February 20, 1950, this court entered the following order in this case:

"Per Curiam: Inasmuch as the Attorney General of Georgia stated at the bar of this Court that plain, speedy and efficient state remedies were available to appellant, the cause is ordered continued for such period as will enable appellant with all convenient speed to assert such remedies."

At that time appellee was enjoined from taking any steps looking toward a final judicial determination of appellant's liability for ad valorem taxes. (Copy of this injunction and order modifying same is set forth on page 8 of brief in opposition to the motion to terminate continuance filed by intervenors amici curiae in this case.) After the entering of the above quoted order of this Court the injunction was modified in order to permit the appellee to proceed to assess the valuation of the property of appellant, but appellee was restrained from initiating any other procedure to test ad valorem taxability of the appellant.

Appellee then proceeded to assess the property of appellant and after such assessment an appeal was taken to the Superior Court of Richmond County, Georgia. That court found all issues of taxability in appellee's favor. Appellant then appealed this decision to the Supreme Court of Georgia, which court in a ofour to three decision held that the procedure followed was inappropriate but rendered no opinion on the merits of the claim. (See copy of the opinions filed in that decision on page 7 of Appellant's motion to terminate the continuance.) Appellee has at all times since October 2, 1949 been restrained from initiating any other remedies to have the issue of appellant's ad valorem taxability decided by the Courts of Georgia. Appellee insists that other State remedies exist which have not been pursued.

(a) Remedy by affidavit of illegality

Appellant has urged as its reason for refusing to consent to a modification of the injunction, for the purpose of allowing appellee to take the initial steps of testing the issue of taxability by the affidavit of ille-

gality, that once the fi. fas. are placed in the hands of the various Sheriffs, the appellee could then say that the matter was beyond his control and thereby place the appellant under the burden of proceeding against each Sheriff for an injunction restraining the levies and that such procedure would consequently involve a multiplicity of actions. Appellee has been willing to enter into a stipulation and appellee remains willing to enter into a stipulation, that should the procedure of affidavit of illegality be used, appellee will issue only such fi. fas. as will properly raise all issues of taxability that now exist between appellant and appellee. And, further, appellee is willing to stipulate that such fi. fas. as are issued will be subject to recall by the appellee from the Sheriffs into whose hands they fall for levy, and that such Sheriffs will at all times be and remain merely agents of appellee for the purpose of raising the issue of taxability.

(b) Partial payment and suit for refund.

It is the position of appellee that appearant has failed to avail itself of the remedy of payment of the taxes, in whole or in part, and suing for refund as provided by Section 92-8436 of the Georgia Code Annotated, Pocket Supplement. At least the State's portion of the tax is subject to this procedure although some doubt may exist as to its propriety for the portion due to the taxing subdivisions. Appellee insists that if appellant had made a sincere effort to test the issue of taxability before the courts of Ceorgia, this method could be used without the slightest danger of irreparable injury to appellant for the simple reason that should the determination of liability be against it, it would have already paid the taxes, in whole or in part, that is rightfully owed; and should appellant be successful

in resisting liability, any payments made would be refunded, plus 6% interest from the date of payment.

(c) Suit for taxes brought by State Revenue Commissioner

On page 2 of appellant's motion to terminate the continuance and decide the appeal reference is made to a letter, dated March 30, 1950, contained in its Appendix on page 6, which purports to conform in writing the proceedings on oral argument before the bar of this Honorable Court. The letter mentions the plain right of the State Revenue Commissioner to bring suit in the courts of Georgia to collect the tax and the additional statement that the State Revenue Commissioner will not bring such suit. At the time of the discussion mentioned in this letter, it was the belief of counsel for appellee that the injunction pending appeal restrained the use of this method of testing the issue of taxability. The appellant's omission to state this belief of counsel for appellee results in creating the false impression that it is the appellee who is thwarting the pursuit of all available State remedies, when in fact the deliberate refusal and failure on the part of appellant to consent to a modification of the injunction is responsible for the failure to exhaust all possible remedies before the courts of Georgia.

2.

It is the position of the appellee that appellant's refusal to consent to a modification of the injunction pending appeal, as amended, has resulted in direct disobedience of the order entered on February 20, 1950, by this Honorable Court directing this cause continued until appellant asserts "such remedies."

WHEREFORE, the appellee urges that this motion to terminate the continuance and decide the appeal be denied, and that appellant be directed to consent to the modification of the injunction in order that the appellee may take such steps as will raise the issue of taxability of appellant's property before the courts of Georgia.

Respectfully submitted.

EUGENE COOK, Attorney General of Georgia

M. H. BLACKSHEAR, JR.,

Deputy Assistant Attorney

General of Georgia.

201 State Capitol Atlanta, Georgia

GEORGIA, FULTON COUNTY.

In person appeared before the undersigned officer authorized to administer oaths, M. H. Blackshear, Jr., who, being sworn on oath says that he is of counsel for appellee in the above case and has personal knowledge of the facts stated in the foregoing answer to motion of appellant to terminate continuance and decide appeal.

M. H. BLACKSHEAR, JR.

Sworn to and subscribed before me this____day of October, 1951.

Notary Public

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SUPREME COURT OF THE UNITED STATES
October Term, 19

No. 454

GEORGIA RAILROAD & BANKING CO. Appellant,

CHARLES D. REDWINE,
STATE REVENUE COMMISSIONER

Appellee

APPEAL FROM THE DISTRICT COURT OF THE NORTHERN DISTRICT OF GEORGIA

INTERVENTION AMICI CURIAE

Victor Davidson, Irwinton, Ga. Special Attorney for Intervenors.

MORGAN COUNTY
OGLETHORPE COUNTY
GREENE COUNTY
CITY OF GREENSBORD
CITY OF UNION POINT
Jos. G. Faust, Attorney,
Greensboro, Ga.
WARREN COUNTY
Joe H. Terrell, County Attorney,
Warrenton, Ga.

CLARKE COUNTY
Carlisle Cobb, County Attorney,
Athens, Ga.

McDUFFIE COUNTY

J. Glenn Stovall, County Attorney,
Thomson, Ga.

NEWTON COUNTY
C. C. King, County Attorney,
Covington, Ga.
FULTON COUNTY

Standish Thompson, Attorney, Atlanta, Ga. ROCKDALE COUNTY

J. H. McCails, Dempsoy W.
Leach, Attorneys, Convers, Ga.
WALTON COUNTY
Roberts and Roberts, Attorneys,
Monroe, Ga.

DEKALB COUNTY

Julius A. McCurdy, County

Attorney, Decatur, Ga.

BURKE COUNTY
E. M. Price, County Attorney,
Waynesboro, Ga.
CITY OF MADISON

TOWN OF RUTLEDGE A. F. Jenkins, Attorney, Madison, Georgia

TALIAFERRO COUNTY Cegood O. Williams, County Attorney, Crawfordville, Ga.

J. F. Hardin, County Attorney, Augusta, Ga.

TALBOT COUNTY
J. A. Smith, Attorney, Atlanta,
Georgia

TAYLOR COUNTY
CITY OF REYNOLDS
CITY OF BUTLER

J. R. Lunsford, Attorney, Butler, Georgia

PEACH COUNTY
PEACH COUNTY
BOARD OF EU CATION
CRAWFORD COUNTY

CRAWFORD COUNTY
Sam M. Matthews, Attorney, Fort
Valley, Ga.

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IN THE SUPREME COURT OF THE UNITED STATES

GEORGIA RAILROAD & BANKING CO., Appellant

No. 454

CHARLES D. REDWINE, STATE

REVENUE COMMISSIONER,

Appellee

October Term, 1949

INTERVENTION AMICI CURL E

This case is of such importance that the Counties and municipalities desire leave to intervene amici curiae, and file briefs.

There are three railroad corporations in Georgia which have been receiving tax exemption for more than one hundred years, to-wit: the Georgia Railroad and Banking Company, the Augusta and Savannah, and the Southwestern. Some portion of one or more of these three railroads lies in twenty-nine different countries of the State of Georgia whose population aggregate approximately one-half the population of the State. The Augusta and Sayannah having consolidated with the Central of Georgia had its property returned for taxation for the first time in 1949.

These counties and municipalities are vitally interested in the outcome of this decision inasmuch as this decision affects the claims for taxes not only against the present plaintiff but against the other railroad which claims similar tax exemptions.

The case is most important because, should this Court hold that the judgment against Wright is binding on the present State Revenue Commissioner and the State of Georgia, it will preclude the State, the Counties, the school districts, and the municipalities forever from attempting to tax this railroad as well as bar them from attempting to collect taxes from the Southwestern Railroad.

In all probability, there have been more cases decided by the Supreme Court of the U. S. relative to the tax exemption clause in the charter of the Georgia Railroad and Banking Company than that of any other corporation. Yet all of these with the exception of one were cases against officials of the State in an individual capacity, and hence, the State not being a party thereto, or present in court could not have its rights determined and was not bound by the decisions. The one case in which the State was a party was that of Atlantic Coast Line Railroad v. Phillips, 332 U. S. 168, 91 L. E. 1977 Should the judgment of the court below be sustained, it is probable that other cases will be for determination as to the rights of taxation by Intervenors Amici Curiae, unless the decision in this case should definitely determine that the Company has no right to any tax exemption.

Intervenors Amici Curiae desire that they be allowed to provide the equal protection of the laws as guaranteed by the 14th Amendment to all their citizens by taxing this railroad in the same manner all other taxpayers are taxed. In order that the rights of taxation may be definitely fixed, Intervenors respectfully pray the United States Supreme Court to review the grounds set forth in the original and amended motion to dismiss the petition of plaintiff in the court below and order that it be dismissed not merely on the ground given by the court below but also on each of the following grounds, in

order that future litigation will be unnecessary to determine the validity of these grounds:

- 1. The present action and also the action in which the judgment was rendered now sought to be enforced were each a suit against the State of Georgia to which the State has not given its consent to be sued.
- 2. The case of Musgrove v. Georgia Railroad and Banking Co., 204 Ga. 139, is res judicata as to all issues involved in the present case.
- 3. The exemption pleaded denies all the people of Georgia the equal protection of the law guaranteed by the 14th Amendment, and the people had the right to adopt the Constitution of 1945 repealing all such exemptions.
- 4. Even though a valid tax exemption had been provided by the charter of this Corporation, the Corporation violated its contract by failing to construct the railroads specified by the charter and hence forfeited any exemption.
- 5. The exemption granted to Georgia Railroad Co. in 1833 was not granted to the Georgia Railroad & Banking Co. by the charter of 1835.
- 6. One of the branches of the railroad, 67 miles long from Madison to Atlanta, has never had charter exemption at all.
- 7. Georgia has provided ample remedies at law in her own courts in which appellant can test any claim to tax exemption.

Historical Account of the Present Litigation

In 1904, the Georgia Railroad and Banking Company brought its action against W. A. Wright, Comptroller-General of Georgia, praying the judgment sought to be enforced by the present action. No plea was filed by the defendant on the grounds that it was an action against the State, and judgment was rendered against Wright. In 1945, the Georgia Railroad and Banking Company filed an almost identical suit in the Superior Court of Fulton County, Georgia, pieading the above action as res judicata and judgment and praying judgment similar to that in the above case. This time the action was against 1. E. Thompson, State Revenue Commissioner, and successor in duties to the Comptroller General insofar as taxes were concerned. This time the defendant pleaded that it was an action against the State to which the State has not given its consent. The Supreme Court of Georgia sustained this contention and so held it not maintainable. Musgrove v. Georgia Railroad and Banking Company, 204 Ga. 139. On appeal to the United States Supreme Court, on motion of Appellant the present Appellee, Charles D. Redwine, was substituted as Appellee, and then the appeal was dismissed. Georgia Railroad and Banking Company v. Musgrove 335 U.S. 900.

Upon dismissal of the last action, thus affirming the decision of the Supreme Court of Georgia, Appellant filed the present action in the District Court for the Northern District of Georgia. Appellee pleaded that it was an action against the State as well as the action against Wright in 1904 described above was one against the State and that the State had not consented in either case to the suit, and further pleaded that the decision of the Georgia Supreme Court of Musgrove v. Georgia Railroad and Banking Company was res judicata as to the present action. The three-judge court sustained motion of defendant and dismissed the action.

No Consent by the State of Georgia to Be Sued

The theory upon which the present action is brought is that the judgment in the case brought by Georgia Railroad and Banking Company against W. A. Wright, Comptroller-General of Georgia in 1904, is now in the present case sought to be enforced, was rendered in an action against the State of Georgia to which the State had consented to be sued, basing the action upon the case of Gunter v. Atlantic Coast Line Railroad Co., 200 U. S. 273, 50 L. E. 477.

That action was based on a judgment in the Pegues case wherein the state had consented to be sued. There had been no intervening or supervening decisions changing the law, no changes in conditions, no changes in the Constitution revoking any exemptions, no breach of contract on the part of the plaintiff, nor any other new issues, such as we have in the present case.

In all the cases cited by counsel in the Federal courts, so far as we have been able to find, wherein a judgment had been rendered previously against a State officer and later an acton was brought to enforce that judgment and the Court overruled the defense that the second action was against the State, it appeared either that the laws of the State authorized the suit in the first instance or that there was no method provided by the laws of the State by which the plaintiff could litigate with the State in any court over the issues involved.

THE WRIGHT CASE

Opposing counsel insist that the Wright Case was one in which this state consented to be sued and give as one of his reasons for so thinking, the message of Governor Hoke Smith to the legislature of Georgia in June of 1908, almost a year after the judgment had been rendered by Judge Newnan. It will be remembered that the pleadings in this case were filed during the first part of 1904 when a different Governor was in office and Governor Smith did not take office until 1908.

Counsel give as another reason for so thinking, is that the laws of Georgia authorized the Comptroller General to command the services of the Attorney General in the collection

of taxes. It will be noted that this is still the law except that all the powers of the Comptroller General relative to such are conferred upon the State Revenue Commissioner, yet the Supreme Court in the Musgrove decision, supra, as well as in many others, have held that such cases are against the State.

Wright had no authority to bind the State by asking a Declaratory Judgment

The question was argued in the courts below as to whether the Comptroller General in entering the litigation in the Wright case and praying for a declaratory judgment relative to the tax exemption in question, was an act of the State and in so doing that the judgment bound the State.

We might first observe at that time there was no provision in either the State laws or the Federal statutes authorizing declaratory judgments.

In the case of Southern Railway Co. vs. State, 116 Ga. 276 (2) decided in 1962, the State brought an action against the Southern Ry. Co. in which it prayed "that the rights and equities of the parties in and to the subject matter be ascertained, determined and declared and be established and enforced by proper orders and decrees of the court; that it be decreed that the defendant has no right to the use of the disputed premises . . ."

The court dismissed the action because a declaratory judgment is not maintainable in this state.

If the Comptroller General was not authorized to ask for declaratory judgments in the State courts neither would he be in the Federal courts.

From the foregoing it is apparent that the laws of Georgia made no provision for the Comptroller General entering into Titigation asking a declaratory judgment such as is evident Wm. A. Wright did. As Comptroller General he had only the powers granted him by law. If he exceeded these powers, he was acting in an individual capacity and whatever judgment may have been rendered the State was not affected.

Section 268 of the Code of 1895. "Powers of public officers are defined by law, and all persons must take notice thereof. The public cannot be estopped by the acts of any officer done in the exercise of a power not conferred."

The General Assembly in the act of 1902 had declared the franchises of railroads taxable. It was the duty of the Comptroller General to enforce this law by issuing tax executions and litigating in the manner provided by the laws of Georgia at that time. When the injunction was entered in the Federal Courts it was his duty to call in the services of Attorney General and ask that it be dismissed as an action against the State, and that plaintiff be required to litigate in the courts provided by law. He had no more authority to engage in this litigation as an official and ask for a declaratory judgment than he would have had in the State courts.

The Governor had no power over this case

Code of 1895. "Section 23. When any suit is instituted against the State, or against any person, in the result of which the State has an interest, under pretense of any claim inconsistent with its sovereignty, jurisdiction or rights, the Governor shall, in his discretion, provide for the defense of such suit, unless otherwise specially provided for."

We urge that the Governor had no power to require the Attorney General to ask for a declaratory judgment in this case because the suits referred to therein were such as were authorized by the legislature to proceed against the State.

Code section 102-109 provides that the State shall not be bound by the passage of any law unless named therein, and

in the case of Lingo vs. Harris 73 Ga. 28 the court held that doubts shall be resolved in favor of the public.

As to whether the Wright case was one against Wright in his official capacity, the distinction is drawn in the case of Ramsey vs. Hamilton as Treasurer, William B. Harrison as Comptroller General, et al, 181 Ga. 365, which held that the word "as" showed it to be against the Comptroller General in his official capacity.

It will also be observed that in the recent case of Georgia Railroad and Bkg. Co. vs. Musgrove, in which Mr. Redwine was substituted as defendant in the U. S. Supreme Court, the action was originally filed against "M. E. Thompson as State Revenue Commissioner" and when demurrers were filed an amendment was made striking the word "as" and substituting the words "who is".

Chief Justice Taft, in his opinion in the case of Gorham Manufacturing vs. Wendell, 261 U.S. 1, 67 L. ed. 505, ex-505, expresses our contentions in this case so forcefully that we quote the following two extracts from his opinion:

"A suit to enjoin a public officer from enforcing a statute, or to compel him to act by mandamus, is personal, and, in the absence of statutory provision for continuing it against his successor, abates upon his death or retirement from office. . . .

"It is in the shifting from the personal liability of the first officer, for threatened wrong or abuse of his office to the personal liability of his successor, when there is no privity between them, as there is not if the officer sued is injuring or is threatening to injure the complainant, without lawful official authority. There is no legal relation between the wrong committed or about to be committed by the one, and that by the other." (p. 506). We quote from the headnotes in Kennecott Copper Corp. vs. State Tax Commissioner, 327 U. S. 57390 LE 862.

- "2. Clear declaration of a state's consent to suit against itself in the Federal courts on fiscal claims is required, it being the right of a State to reserve for its courts the primary consideration and decision of its own tax litigation because of the direct impact of such litigation upon its finances."
- "3. Consent of the State of Utah to be sued for an occupation tax refund 'in any court of competent jurisdiction' may not be construed as a consent to be sued in a Federal Court."

See in this connection

Great Northern Life' Insurance Co. vs. Read, Ins. Com. 322 U. S. 47, 88 L. E. 1121 and Ford Motor Co. vs. Dept. of Treasury of Indiana, 323 U. S. 459, 89 L. E. 389.

Both of these latter cases distinguishes the Gunta case from these because of the fact that in the Pegues case, upon which judgment the Gunter case was based the laws of South Carolina authorized the suit against the State.

Plaintiff Prass a Declaratory Judgment

If the present action be treated as a declaratory judgment proceedings, inasmuch as it is prayed that the Wright judgment be declared res judicata, we should consider whether jurisdiction has been granted by the statutes of Georgia or by the Federal statutes. The recent case decided in the Supreme Court of Georgia of Musgrove vs. Georgia Railroad and Banking Company, 204 GA. 139, held that the Georgia Courts had no jurisdiction to grant a declaratory judgment in this matter.

From Anderson on Declaratory Judgments, p. 119, we quote the following:

"Where the State's interests are drawn into question in a declaratory judgment action, the STATE MUST be made a party or represented pursuant to the law of the particular jurisdiction (italics supplied) . . ."

Section 28-1341 of the Federal Code as enacted in 1948 provides as follows:

"The district court shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under the State law where a plain, speedy and efficient remedy may be had in the courts of the State."

In view of the fact that a judgment such as its prayed by plaintiff would have the same effect of suspending the assessment, levy or collection of taxes as if an injunction was granted, we think it was clearly the intention of Congress in enacting the above to prevent the district courts from interfering with States' rights in the construction of their tax statutes.

We quote from the case of Great Lakes Dredge & Dock Co. vs. Huffman, 319 U. S. 293, as follows:

"It is in the public interest that Federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states.

"The scrupulous regard for the rightful independence of state governments which should at all times actuate the Federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted Federal right may be preserved without it. Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and com-

plete, the aggrieved party is left to that remedy in the State courts, from which the cause may be brought to this Court for review if any Federal question is involved.' Matthews vs. Rogers, 284 U. S. at pages 525, 526, 52S Ct. at pages 219, 76 L.ed. 447.

"Interference with State internal economy and administration is inseparable from assaults in the Federal courts on the validity of State taxation, and necessarily attends injunctions, interlocutory or final, restraining collection of State taxes. These are the considerations of moment which have persuaded Federal courts of equity to deny relief to the taxpayer—especially where the State, acting within its constitutional authority, has set up its own adequate procedure for securing to the taxpayer the recovery of an illegally exacted tax."

THE LAW OF THE CASE

The plaintiff in attempting to enforce the judgment is bound by the law of the case in which the judgment was rendered. When the case was carried to the United States Supreme Court as reported in the 216 U. S. 420 that court reversed in part the judgment of the court below and held that the decision of the court in the State of Georgia vs. Georgia Railroad and Banking Company, 54 Ga. 423, is not resjudicata. That decision as the law of the case is binding on plaintiff and should estop it from pleading in this action as set out in Paragraph 22 of the petition that the decision in the 54 Ga. is resjudicata.

Again, the United States Supreme Court in its decision held that judgments as to taxes for one year is not res judicata as to taxes for other years. This rule, too, is the law of the case and plaintiff is bound thereby.

Under the foregoing law of the case, appellant has no case which it can lean on as res judiçata.

We come into this case with two separate and distinct judgments sustaining our position in urging that judgments

heretofore rendered relative to the taxes for the Georgia Railroad & Banking Company are not res judicata as to years other than those on which the action was based. Both of these judgments were in cases in which the Georgia Railroad &. Banking Company was plaintiff and the Comptroller General of the State of Georgia was the defendant, one of which judgments is the law of the present case.

First, in the Georgia Railroad & Banking Company vs. Wright, Comptroller General, 124 Ga. 596, counsel for plaintiff pleaded that judgments relative to taxes for one year were not res judicata as to taxes for other years. In that case, plaintiff took the same position which we are taking now, and the Supreme Court of Georgia ruled with plaintiff and so held.

Judge Candler in his opinion, pages 603 and 606, argues this question so effectively that we quote from it at length:

"2. Counsel for the Georgia Railroad, however, contend that even if it is concluded by the judgment of the Supreme Court of the United States to its liability for the tax sought to be enjoined in the proceeding before the court, the estoppel of the judgment extends only to the question of the railroad's liability for the tax for 'he year 1900, and that it is not cut off from contesting the validity of the tax for all the other years in the present suit, from 1883 to 1904 inclusive. The question turns, of course, largely if not entirely upon whether suits for different taxes, or for taxes for different years, constitute different causes of action; for suits to enjoin the collection of taxes would necessarily be governed by the same principles.

"In the case of Davenport vs. Chicago R. Co., 38 Ia. 633, 640, the Supreme Court of Iowa held that a decree in favor of a railway company in a suit for taxes for a prior year would not estop the State from collecting the tax for a subsequent year, each year's taxes constituting a distinct and separate cause of action. . . It

could never be tolerated that the State should be forever barred in its collection of taxes by an erroneous decision. As a matter of public policy, and upon grounds of public necessity, we think the principle of res judicata ought not to be applied to questions of taxation where the State is exercising its sovereign power."

(Emphasis supplied.)

Second, in 1904 when the Georgia Railroad & Banking Company filed its petition in the Federal Court and invoked the judgment which is now sought to be enforced, it took the opposite view and urged that judgments relative to taxes for one year are res judicata as to other years, pleading that the case of State vs. Georgia Railroad & Banking Company, 54 Ga. 423, was res judicata. The Supreme Court of the United States, on appeal, held that the foregoing case was not resigudicata.

This judgment was rendered in 191Q after the Washington Branch had escaped taxation for 60 years. The United States Supreme Court, 216 U. S. 420, 30 Sup. Ct. 245, page 245, gives as its reason for refusing to treat the above case as res judicata as follows:

"But in Georgia R. & Bkg. Co. vs. Wright, 124 Ga. 596, 53 S. E. 251, the Supreme Court of Georgia seems to have definitely decided that a judgment in a suit to collect a tax assessed for one year is not a bar to a suit for taxes subsequently assessed for another year, although the question decided in the first case is the same question upon which the second suit must also be decided.

"This court, as is well settled, accords to a judgment of a state only that effect given to it by the court of the state in which it was rendered. Union & Planters' Bank vs. Memphis, 189 U. S. 72, 47 L ed. 712, 23, Sup. Ct. Rep.; Covington vs. First Nat. Bank, 198 U. S. 100, 49 L.ed. 953, 25 Sup. Ct. Rep. 562. We shall therefore disregard this plea, and determine the matter upon its

merits, giving to the decision of the Georgia court consideration only as an authority."

In the face of the foregoing decision of the United States Supreme Court, plaintiff, in its present petition, again pleads that the decision in the 54th Georgia res judicata, and likewise that the Wright case is res judicata.

In support of our contention we cite the following authorities:

Floyd & Lee vs. Boyd, 16 Ga. App. 42 (3).

"3. A judgment can not be the basis of a plea of res judicata in an action in which the parties are not the same as in the case in which the judgment was rendered, although the cause of action be the same in both cases."

Whitehead vs. Pitts, 127 Ga. 774e 776.

"If one is made a defendant in an official capacity, the judgment will not bind him personally, and if made a defendant personally, it will not bind him officially."

THE DOCTRINE OF RES JUDICATA, AS APPLIED TO TAXATION

Plaintiff insists that under the Georgia law, judgments relative to taxes for one year are res judicata as to taxes for future years, and cite as their authority the case of Coleman vs. Fields, 142 Ga. 205. At first glance, it would appear that this decision is important. However, as we analyze it, we find that it does not apply to the case at bar. In that case, the parties were the same and the State was not involved; the facts and the law were identical in the two cases, no new issues having been raised in the second case, no supervening decisions nor changes in the law, nor changes in conditions, nor breach of contract pleaded as in the present one.

A careful comparison of the ruling of the court therein with that of Commissioner of Internal Revenue vs. Sunnen, 333 U. S. 591, 92 L. ed. 898 shows no great conflicts in the decisions of the Courts of Georgia and those of the United States Supreme Court. The Sunnen case is so sweeping in its decision that we will quote from it at length:

"But where the second action between the same parties is upon a different cause or demand, the principle of res judicata is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.'

.... Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time....

- "(6) These same concepts are applicable in the Federal income tax field. Income taxes are levied on an annual basis. Each year is the origin of a new liability and of a separate cause of action. Thus if a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is res judicata as to any subsequent proceeding involving the same claim and the same tax year. But if the later proceeding is concerned with a similar or unlike claim telating to a different tax year, the prior judgment acts as a collateral estoppel only as those matters in the second proceeding which were actually presented and determined in the first suit. . . .
 - mination of a particular tax matter, a matter which may recur without substantial variation for some years thereafter. But a subsequent modification of the significant facts or a change or development in the controlling legal principles may make that determination obsolete or electroneous, at least for future purposes. If such

determination is then perpetuated each succeeding year as to the taxpayer involved in the original litigation, he is accorded a tax treatment different from that given to other taxpayers of the same class. As a result, there are inequalities in the administration of the revenue laws, discriminatory distinctions in tax liability, and a fertile basis for litigious confusion. . . Such consequences, however, are neither necessitated nor justified by the principle of collateral estoppel. That principle is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers.

"(8, 9) And so where two cases involve income taxes in different taxable years, collateral estoppel must be used with its limitations carefully in mind so as to avoid injustice. It must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged. . . . If the legal matters determined in the earlier case differ from those raised in the second case, collateral estoppel has no bearing on the situation. . . . And where the situation is vitally altered between the time of the first judgment and the second the prior determination is not conclusive. . . . As demonstrated by Blair vs. Commissioner, 300 U.S. 5, 9, 57 Ct. 330, 331, 81 L'ed. 465, a judicial declaration intervening between the two proceedings may so change the legal atmosphere as to render the rule of collateral estoppel. inapplicable. But the intervening decision need not necessarily be that of a state court, as it was in the Blair case. While such a state court decision may be considered as having changed the facts for federal tax litigation purposes, a modification or growth in legal principles as enunciated in intervening decisions of this Court may also effect a significant change in the situation. Tax inequality can result as readily from neglecting legal

modulations by this Court as from disregarding factual changes wrought by state courts. In either event, the supervening decision cannot justly be ignored by blind reliance upon the rule of collateral estoppel. (Emphasis supplied).

Assuming that the Wright judgment was in reality a judgment against the State, then and in that event had there been intervening and supervising decisions, change in the conditions, changes in the Constitution, the State could litigate any question not in issue in that case. Judge Newnan in his ruling states what these issues were:

"... (1) Does the word stock, as used in this taxing clause in the company's charter, refer to stock in the aggregate in the hands of the company (its capital stock), or does it refer to stock in the hands of the shareholders? (2) Is the decision of the Supreme Court of Georgia rendered in 1874 on the right to tax this corporation res judicata in this case? And (3) is this company subject to a tax on its franchise under the franchise tax act of the Legislature of Georgia of 1902 (Laws 1902, p. 37), in view of the taxing clause in its charter? Other minor questions are raised, but the foregoing are the main and important ones. ..."

It will be noted that Judge Newnan based his decision largely on the decision of Judge McKay in the 54th Georgia, which was rendered at a time when the rule for the construction of tax exemptions was much broader than now.

The rule of construction of this tax exemption has now drastically changed. It is:

The narrowest rational reading of the exemption.

Railroad Co. vs. Phillips, State Revenue Commissioner, 332 U. S. 168, when it was on appeal to the United States Su-

preme Court, that court applied the latter rule to the section 15 now in question.

Should this rule be applied in this action the exemption would end.

THE REDWINE CASE IN RES JUDICATA

We call attention to the recent case of Georgia Railroad and Banking Company, vs. Charles D. Redwine, State Revenue Commissioner. (The case having been originally filed against Honorable M. E. Thompson, State Revenue Commissioner, later Honorable Glenn S. Phillips substituted as party defendant by consent, later Honorable Downing Musgrove substituted as party by consent and Honorable Charles D. Redwine substituted as party defendant in the United States Supreme Court without his consent.) This case was reported in 204 Ga. 139, as Musgrove vs. Georgia Railroad and Banking Company. We quote the following from the syllahus:

"In the instant suit, brought by the company against the State Revenue Commissioner, it sought among other things to obtain a declaratory judgment decreeing that such charter provision constitutes a contract between the plaintiff and the State of Georgia, valid and binding upon the State and its officers in perpetuity, and prayed also for perpetual injunction to restrain the defendant and his successors in office from assessing certain of its railroad properties described as charter tax lines from ad valorem taxation. Held:

"Whether the petition be construed as one brought against the defendant in his official capacity or in his individual capacity, it was in substance and effect an action against the State and was not maintainable, the State not having consented to be thus sued. The court therefore erred in overruling the third ground of general demurrer presenting this contention. Other grounds of demurrer, whether general or special, should not have

been passed upon, and direction is given that ground 3 of the general demurrer be sustained and that the petition be thereupon dismissed, without any ruling or judgment as to other grounds, and without prejudice to either party or the State with respect thereto."

The foregoing involves identical issues as are involved in the present case. In the Wright case no issue was made as to whether it was an action against the State to which the State had not consented to be sued.

We respectfully suggest that this case is res judicata on the question as to whether the present action and also the action in the Wright case was one against the State to which the State had not given its consent to be sued.

Plaintiff admits that the Musgrove or Redwine decision is Res judicata, in that it is a suit against the State.

When the above case was pending in the United States Supreme Court on appeal plaintiff filed a motion to substitute the present defendant as party defendant in the place of Musgrove and prayed that in the event Mr. Redwine was not made a party that the court "reverse the judgment of said State Supreme Court erroneously holding that this is a suit against the State, and remand said suit to said State Supreme Court with direction that it order the Superior Court of Fulton County, Georgia, to dismiss said suit as moot, -so that said judgment of said State Supreme Court, erroneously holding that this is a suit against the State, may not bar appellant from resisting any future effort on the part of said Charles D. Redwine, or any successor in office to him, as a wrongdoer would be held by said State Supreme Court likewise to be a suit against the State and not maintainable since such a suit would be in all essential respects identical with this suit." (Emphasis supplied)

If this judgment would be res judicata in the State courts, is it not entitled to the same respect in this court?

The United States Supreme Court rejected their request to prevent it from becoming res judicata, and hence deliberately made it res judicata.

OF TWO CONFLICTING JUDGMENTS, THE LAST WILL PREVAIL

We have a situation where plaintiff, in 1907, obtained a judgment against William A. Wright, Comptroller-General, construing the alleged contract between it and the State of Georgia. Not satisfied with that judgment, this same plaintiff, in 1945, went into the State courts and sought another declaratory judgment on the same subject matter, the allegations in the two cases being almost identical. Plaintiff lost in the last case, and now it goes back to the Federal courts and seeks to obtain another judgment relative to the same subject matter. Defendant pleads the judgment in the State courts as res judicata.

"The real question before the District Court in the instant case, therefore, was whether the judgment which worked as estoppel as to the value of the timber was the judgment of the Board of Tax Appeals or its own prior judgment. It is not doubted that the judgment of the Board could have been successfully relied on to establish the value of the timber in the first suit before the District Court. But the government, for reasons of its own, chose not to rely on it in that suit, and in our opinion thereby waived it, and cannot assert it in this case. Where there are two conflicting judgments, the last in point of time is the one which controls."

Donald vs. J. J. White Lumber Co., 68 F. (2d) 441, 442.

We also quote from

50 C. J. S. 597, as follows:

"Waiver of, or Estoppel to Assert, Conclusiveness or Bar. A party who is entitled to claim the benefit of a

former judgment may waive, or be estopped to assert, the right.

"Although it has been said that, when a cause has been once fairly tried, it ought not to be tried aagin, even if the parties are willing, it is nevertheless a general rule that a party entitled to claim the benefit of a former judgment may waive or stop himself to assert such right. So, where a party is guilty of laches in setting up the defense of res judicata, or joins issue on the very questions settled by he judgment, or voluntarily opens an investigation of the matters which he might claim to be concluded by it, or makes an admission of record inconsistent with the former judgment, he will be held to have waived the benefit of the estoppel, and the case may be determined as though no such former judgment has been rendered."

A strikingly similar case to the one at bar is found in that of

Walkup vs. Covington, 173 Tenn., 7.

Walkup filed action in the State courts asking for a homestead of \$2000.00 to be set apart to him. Objections were filed, and the case was left pending. Later, he was adjudicated bankrupt in the Federal courts and prayed for the same \$2000.00 homestead. Only a \$100.00 homestead was set apart to him in the Federal court. The Trustee in Bankruptcy attemped to dismiss the action still pending in the State courts. Walkup objected to this, and appealed this to the State Supreme Court of Tennessee. That court held:

"One may not abandon a court and a cause in which he has sought a given relief and voluntarily seek an adjudication of his right in another jurisdiction, and after having therein litigated to a conclusion on the issues, return to the court of original action and there seek to re-open and re-adjudicate the issues."

THE PEOPLE OF GEORGIA HAD THE RIGHT TO REVOKE TAX EXEMPTIONS

There are three reasons why the people had the right to revoke any tax exemptions in adopting the Constitution of 1877 and 1945.

- 1. The right of sovereignty was reserved to the people by the Constitution of 1798.
- 2. Under the Fourteenth Amendment to the Federal Constitution, the State was under obligation to give its people the equal protection of the laws which were denied by the tax exemption clause of certain railroad corporation charters.
- 3. The plaintiff had violated its contract to construct the railroads provided by the charter.

Insofar as the first reason is concerned, as set forth in the amended answer and motion to dismiss, the people of the State of Georgia in the Constitution of 1798 reserved to themselves the sovereignty of the State. No legislature had the power to contract away in perpetuity any of the sovereignty, and when the people reasserted that right in revoking the exemptions heretofore granted by the legislature in the Constitution of 1877 and 1945, they were within their rights.

As for the second reason, the Fourteenth Amendment, aimed against discrimination, is superior to the original provision of the Constitution which guaranteed the sanctity of contracts.

In adopting the Constitution of Georgia, the people of Georgia had the inherent right to construe the Constitution of the United States, and where the enforcement of one of the laws guaranteed by the original Constitution was in conflict with a later amendment of the Constitution, the people

of Georgia had the right to repeal such a law and by doing so give to all the people of Georgia that qual protection of law guaranteed to them by the Fourteenth Amendment.

16 C. J. S. p. 89

"While amendments are part of the Constitution, according to some cases, they are not regarded as if they had been parts of the original instruments, but are considered rather in the nature of codicils or second instruments, altering or rescinding the originals to the extent to which they are in conflict, and, in any event, they are to be treated as having a force superior to, and as superseding, their originals or other earlier provisions, to the extent of such conflict. . ."

Under the foregoing we respectfully urge that the people of Georgia were well within their rights when they took the step for restoring their equal protection of the law and repealed this iniquitous discrimination, which throughout the life of this corporation has been so repugnant to the people, as well as the lawmakers, and has so outraged their sense of justice and equity. Especially were they justified in this when they considered that this corporation had already escaped more taxes than the capital stock or cost of building the rail-road amounted to.

They also had the right to consider the fact that the enforcement of Section 15 denied to the school children of Georgia, and especially those counties and municipalities through which this railroad runs, the equality of the protection of and right to the same education that all of the other children are receiving because they were denied the tax funds the life blood which enabled the officials to support these schools, 15 mills being the limit which any county can levy to speak of all of the other benefits of government made possible by the taxing of all the other taxpayers which

this corporation was sharing and will share in perpetuity, yet bearing no part of the costs.

16 C. J. S., pp. 995, 996

(1) In General

Legislation may be limited in scope; and it may be adjusted to differences in things or situations; but it may not make any arbitrary or unreasonable distinction or discrimination; and, within the sphere of its operation, it must accord substantially equal and uniform treatment to all persons similarly situated.

State and municipal legislation is subject to the constitutional requirements that no state shall deny the equal protection of the laws to any person within its jurisdiction; and it is valid as complying with, or invalid as violating, this requirement accordingly as it does or does not, within the sphere of its operation, affect and treat alike, with equality and uniformity and without arbitrary or unreasonable distinction or discrimination, all persons similarly situated. . . ."

"38 . . . There, is no distinction between the effect of privileges conferred and that of burdens imposed. Hill vs. Rae, 159, p. 826, 52 ont. 378, L. R. A. 1917A 495 . . .

A statute is invalid if individuals or corporations are singled out for the imposition of burdens or as beneficiaries.—Pauley vs. Keebler, 185 N. W. 554, 175 Wis. 428 . . .

A state may not grant a right to one which under similar circumstances is denied to another.—Dooley vs. Johnson, 24 P. 2d. 540, 133 Cal. App. 459."

Hillsborough Township vs. Cromwell, 326 U. S. 620, 90 L ed. 359.

"4. While a taxpayer may not complain of discriminatory treatment in violation of the Fourteenth Amendment by subjecting him to state taxes not imposed on

others of the same class if equality is achieved by increasing the same taxes of other members of the class to the level of his own, the constitutional requirement of equality is not satisfied if a states does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking the revision of the taxes of other members of the same class."

As for the third reason, the corporation violated its contract.

The people of Georgia had the additional right to revoke any exemption that might have been contained in Section 15 where the corporation failed to carry out its part of the contract and build the lines specified. The sanctity of a contract is not guaranteed by the Federal Constitution where the complaining party has not complied with the condition imposed upon him by the contract. Before plaintiff can show that the people of Georgia were violating the Constitution in revoking the exemption, it must allege and prove that it has carried out its obligations, and the petition failing to so allege, does not set out a cause of action. We quote from

- 51 C. J. pp. 463, 464, Sections 106 and 107, Railroads: "106. b. Acceptance and Performance of Conditions.
 - (1) In General. In order that a railroad company may become entitled to aid granted to it by a state, county or other municipal corporation, and compel the collection of tax, the issue of bonds, or the like, as the case may be, it must at least substantially perform on its part all the conditions precedent on which the grant was made, unless the performance of such conditions has been waived, or is sufficiently excused; and the acceptance of a grant is an acceptance of all its terms and condition, so that the company is estopped from asserting that such terms of conditions are void and unreasonable. In determining whether conditions have

been complied with, the language used in the grant should be considered according to its ordinary and popular meaning, that is, as it would be understood by the voters or public generally. . . ."

"Conditions subsequent. Where a railroad company fails to perform fully conditions subsequent attached to a grant or acts in consideration of which the grant was made, the municipality granting the aid has a cause of action against the company on common-law principles to recover the money or bonds delivered to it, or the value of the aid."

(107) (2) Construction, Maintenance, and Operation of Railroads.—(a) In General. In accordance with the general rules relating to the performance of conditions attached to a grant of public aid, a railroad company's right to aid granted depends upon its performance of any conditions relative to the construction, maintenance, and equipment of the road, as that it shall be constructed between designated points or to or through a designated place, or that it shall be completed and put into operation. ..."

Plaintiff's Obligations Under Its Charter as a Contract

If the State is bound by the Acts of the General Assembly creating plaintiff as a corporation, then the corporation is likewise bound to carry out the purposes for which is was created. Plaintiff cannot insist on the State being bound without itself being bound. Before plaintiff can demand that the State carry out its part of the contract, it must first allege that the corporation has complied with its part of it.

The Act of 1833 creating the Georgia Railroad Company made the following provisions relative to the roads to be constructed:

"... That the company provided for in this act, and hereinafter more especially incorporated and authorized, shall and may direct and confine their efforts and enterprise to the formation and completion of a railroad communication between the city of Augusta and some point in the interior of the state, to be agreed upon by the stockholders, which road shall be called the Union Rail Road;—and the same being completed, the company shall have power to construct three branch rail roads, beginning at the point agreed upon as the termination of the Union road, or such point for the middle road as the stockholders may select: One running to Athens—one to Eatonton—and the third to Madison, in Morgan county; which branches shall be erected simultaneously. . . . The company shall have the further power to continue the Athens branch towards any point which may be agreed upon, on the Tennessee River. . .

The foregoing Act shows that in 1831 a charter had been granted another corporation to construct a railroad or canal from Augusta to Eatonton, but this charter was repealed in the Act of 1833 and these rights given to plaintiff. Under the 1831 Act Eatonton was entitled to a railroad. Clearly, it was the purpose of the legislature to require the new corporation to perform the duty imposed on the former corporation of constructing a line of communication from Augusta to Eatonton.

The Act of 1835 dissolving the Georgia Railroad Company and creating a new corporation in its stead made the following provisions which sets forth the purposes of its creation:

"Sec. II. The stock of said company shall conist of two millions dollars . . . of which capital, one-half may be used for banking purposes, and not more until the completion of the road to Athens, and one of the southern branches through Greensboro, to be designated by a vote of the stockholders; at which time any capital stock unemployed may be used for banking purposes; provided, however, that the continuation of said road beyond Athens, so as to connect with the Cincinnation road, shall be steadily prosecuted so soon as the company shall have satisfactory evidence that the said connection can be formed."

It will be noted that plaintiff does not even allege that it has built the roads provided in the charter. Failing to do that or failure to allege that it has thus carried out its obligations under its charter by building the roads, there is no cause of action set out.

The Trustees of Dartmouth College vs. Woodward, 4 U. S. Sup. Ct. 664, 671, 672.

- "... The obligation imposed upon them, and which forms the consideration of the grant, is that of acting up to the end or design for which they were created by their founder. Mr. Justice Buller, in the case of the King vs. Passamore says, that the grant of a corporation is a compact between the crown and a number of persons, the latter of which undertake, in consideration of the privilege bestowed, to exert themselves for the good government of the place. If they fail to perform their part of it, there is an end to the compact. ..."
- "... A charter may be granted upon executory, as well as an executed or present consideration. When it is granted to persons who have not made application for it, until their acceptance thereof, the grant is yet in fieri. Upon the acceptance there is an implied contract on the part of the grantees, in consideration of the charter, that they will perform the duties, and exercise the authorities conferred by it..."

In the case at bar, the citizens of Georgia who were to receive the benefits of the railroads to be constructed have been denied these roads by the failure of the corporation to construct them.

In the case of Southwestern and Central Railrod Co. vs. Collins, 40 Ga. 583, the court on page 624 says:

"Each charter of a private corporation is a contract first between the State and the Corporation to which each is so solemnly bound—the State that it will not impair the obligation—the corporation that it will perform the obligations of its incorporation and keep within the powers granted to it."

In the case of

Ordinary vs. Central Railroad and Banking Company, 40 Ga. 647

on page 652, 653 the court held:

"It is insisted that this is a contract between the State and the company, which forever exempts the company from a higher tax than one-half of one per centum on its net income, and that they are entitled to this perpetual exemption from taxation, no matter what may be the exigencies of the State or the burdens of taxation upon her people. If this be so, it is certainly but just to hold the company to such part of the contract as is favorable to the public."

Singleton vs. Southwestern Railroad 70 Ga. 464, 465.

"2. A corporation has only the power conferred upon it by its charter. Its grants of powers and exemptions are always to be strictly construed, and its obligations are to be strictly performed, whether they may be due to the state or to individuals. . . ."

BREACH OF CONTRACT BY PLAINTIFF

The following case is strikingly similar to the case at bar:

Bacon vs. Texas 163 U. S. 207, 16 Sup. Ct. 1023.

In this case the State of Texas passed a statute in 1879, authorizing the sale of unappropriated land for the State of Texas, but required that the purchasers should survey the lands and that the survey be made by the authorized public

surveyor of the county or district in which said land was situated. Bacon, et al, purchased 300,000 acres of this land and entered into possession of same, but failed to have the land surveyed as required and also failed to pay the purchase price until after the state legislature repealed the law although they offered to pay the amount before the case got into court. The State of Texas brought an ouster proceedings. The defendants pleaded impairment of obligation of the contract. The state pleaded failure on their part to perform as required by the statute. The Court of Civil Appeals of Texas held that there was no contract between the parties because of the failure of the defendants to have such survys made as were called for under the Act of 1879.

State vs. Morgan, 28 La. 490, 491.

"... The charge that the State, in assessing the taxes now sought to be collected, has violated the obligation of her contract with the New Orleans, Opelousas and Great Western Railroad Company, cannot be maintained when the second section of the charter is read in the light of the facts disclosed in the record. ..."

"The stipulation in the charter was, that the capital stock and other property of said company shall be exempt from taxation for ten years, after the completion of said road within the limits of this State.' The consideration of the grant of this privilege was, of course, the promise of the corporation to prosecute to completion the work of building the railroad to the Sabine, or the Texas line. (Italics supplied). No time was fixed for the completion of the work; but the understanding doubtless was that it should be completed within the time usually occupied in accomplishing such enterprises.

"Now what has the corporation done toward the completion of the road, and what is the prospect of its completion? Eighty miles were promptly completed, eightyfive miles beyond that have been partially graded, and ninety-eight miles of the road remain untouched. This is all that has been accomplished since the charter was granted, in 1853; a period of over twenty years. Besides, there is no prospect of the completion of the road, no work having been done under the charter beyond Berwick's Bay since 1862, a period of over ten years. Over twenty years have passed, and the road has not been half completed. Over ten years have elapsed, and not a rod has been graded or a rail laid or a bridge built, or any work whatever done on the unfinished divisions of the road by the corporation or by Charles Morgan.

"In the face of such a palpable abandonment of the enterprise, and such a flagrant breach of contract, it is with bad grace that the charge is made by the defendant that the State, in making the assessment and demanding the taxes on the property described in this suit, is impairing the obligation of her contract. . . .

"How can be claim exemption from taxation for the property he acquired when it was conditioned upon the completion of the road, and that enterprise has been abandoned for years? Will a party who has wholly failed to give or perform the consideration of a contract be permitted to hold the opposite party to the obligation contracted as the equivalent of such consideration?..."

Pennsylvania College Cases 80 U. S. 553.

"... Private charters, or such as are granted for the private benefit of the corporators, are held to be contracts because they are based for their consideration on the liabilities and duties which the corporators assume by accepting the terms therein specified..."

The following cases from other states show that a corporation cannot demand its privileges granted in its charter when it fails to perform the acts for which it was created, nor can it demand grants of aid where it fails to comple wit hits of implied contract. In

Town of Henckley vs. Kettle River Railroad Co. 70 Minn. 105.

where the town voted a grant of aid to a railroad and after the company had received the grant and built the road it tore up and discontinued it, the court held that the consideration of the grant was not merely building the road but also the operating of it. Also see,

Ravenswood S. & G. Ry. Co. vs. Town of Ravenswood 41 W. Va. 732, 24 S. E. 597.

In the last case funds to buy stock with were voted by the town to aid in the construction of the railroad. After this was voted the route which had previously been fixed was changed. The court held that the original route was a part of the proposition and that when it was changed the company abandoned its right to the aid voted.

Long Island Water Supply Co. vs. City of Brooklyn 17 Sup Ct. 722.

"... A charter is not simply an executed grant, but a continuing contract. There is a duty of performance by the recipients of the grant which continues during the life of the charter.... (Emphasis supplied)

No Tax Exemption Provided by Act of 1835 Creating a New Corporation, the Georgia Railroad & Banking Company.

The Act of 1835 created an entirely new corporation with all the powers necessary for it to function as such set forth in the Act, and whose name was changed to the Georgia Railroad & Banking Company.

In view of the fact that all statutes providing for a tax exemption must be construed most strongly against the tax-

payer and in favor of the State, it is of importance to determine whether the Act of 1835 created a new corporation or merely amended the charter of the Georgia Railroad Company. If an entirely new corporation was created, it would be necessary for the Act to specifically provide for the tax exemption. The provisions of the Act of 1835 are insufficient to transfer any stock or tax exemption from the Georgia Railroad Company to the Georgia Railroad & Banking Company.

Section III of the Amending Act of 1835 Itself Calls the Georgia Railroad & Banking Company a New Corporation.

An entirely different name was given the new corporation, new powers were given it, new corporators provided for. Unquestionably the Act granted to the new corporation all the powers necessary for a new corporation to carry out its purpose. A new corporation was created and the immunities granted to the Georgia Railroad Company were not conveyed to the Georgia Railroad and Banking Company.

A case in point is

Atlantic and Gulf Railroad Company, vs. State of Georgia, 55 Ga. 312.

which was carried to the Supreme Court of the United States and was affirmed in the 98 U. S. 359. This case involved the question of whether a consolidation of two corporations resulted in the creation of a new corporation. The opinion in that case argues our point so effectively that we quote from the opinion in pages 361, 362 and 363:

"... The 3rd Section continued in force the several immunities, franchises and privileges granted by the original charters and the amendments thereof, and the liabilities therein imposed, but plainly for the benefit of the consolidated companies. Why speak of original. charters, if a later charter was not intended by the Act? That such was theintention appears still more clearly in 3d Section. That conferred upon the consolidated stockholders complete corporate powers. If granted to them, when consolidated, not only a corpolate name, but the right under that name to acquire and hold property, to sue and be sued, to have a common seal, to o make by-laws and generally to do everything that appertains to corporations of like character. This full grant of corporate power must have been intended for some purpose. What was it if not to create a corporation? For that purpose it was amply sufficient. For any other it was unmeaning. If the two original companies were to continue in being, if it was not contemplated that they should be dissolved by consolidation, a new grant of corporate power and existence was unnecessary. They had it already." (Emphasis supplied) .

The reasoning of the Georgia Supreme Court in

The State vs. The Atlantic & Gulf Railroad Co., 60 Ga. 268,

follows this line of thought. We quote from the opinion on page 274:

"If the consolidated company had borne a different name from that of either of the original companies, it would probably have been recognized at once as a new creature.

"... A case of vital succession, or new creation, occurs whenever the consolidated company is incorporated, no matter whether the powers conferred be those which were enjoyed by the prior companies under their respective charters, or powers altogether different. When the new corporate being comes into existence, it is without capacity to take by mere transmission from its predecessors; it can take only by grant, and the instrument of grant is its charter. ..."

Another case in point is that of,

Snook vs. The Georgia Improvement Co. 83 Ga. 61

We quote from page 68 of the opinion:

.. We think that the Act of 1886 is not an amendment to the original charter of the Atlanta & Hawkinsville Railroad Company obtained under the general law, but is a separate, independent and distinct charter. The title to the act is 'An act to incorporate the Atlanta & Hawkinsville Raolroad Company, to confer certainpowers and privileges on said company,t and for other purposes.' Acts 1886, p. 102. The first Section of the Act then names the corporators; and they are not the same altogether as the corporators in the original Act, The act further says, after naming these persons, that they are hereby created a body politic and corporate, under the name', etc., and then proceeds to give them all the powers that are necessary for any tailroad company whatever, the right to sue and be sued, to hold property, to condemn land, to mortgage; the amount of the capital stock is fixed, and the right given to join with other railroads; certain persons are appointed directors to act until a regular election can be held by the stockholders, etc., etc. . . . The title to this amendatory act is as follows: 'An act to amend the charter of the Atlanta & Hawkinsville Railroad Company, to change the name thereof to the Atlanta & Florida Railroad Co., to authorize the extension thereof to the Florida line, and for other purposes.' The first section of that act recites that 'the name of the railroad corporation chartered heretofore by the act of this legislature, under the name of the Atlanta & Hawkinsville Railroad Company, be changed to the Atlanta & Florida Railroad Company.' The 6th section of the act says, that 'said railroad company shall have, in the construction of said extention, all the rights, powers, privileges and immunities granted to and conferred upon the Atlanta & Hawkinsville Railroad Company by the legislature of Georgia, by act approved December 7th, 1886.' Construing these two acts together, and the phraseology of the acts, and the fact that the corporators in the original charter and those mentioned in the act of 1886 are not entirely the same, we conclude that these acts are not amendments to the charter granted under the general railroad law, but a separate and distinct charter granted by the legislature."... (Emphasis supplied)

The foregoing illustrations are strikingly similar to the case at bar and are conclusive that the Act of 1835 created a new corporation and that the Georgia Railroad & Banking Company was granted no tax immunity:

Section 20-115 of the Code of 1933 reads as follows:

"Novation.—One simple contract as to the same matter, and on no new consideration, does not destroy another between the same parties; but if new parties are introduced by novation, so as to change the person to whom the obligation is due, the original contract is at an end."

Here is no specific grant of tax immunity. A grant in the Act of 1833 of tax immunity to the Georgia Railway Company, is not a grant of tax immunity to the Georgia Rail oad & Banking Company when created in 1835.

This is emphasized in the case at bar:

Wright vs. Ga. Railroad & Banking Co., 216 U. S. 420, 54 L.ed. 544,

from which case we quote headnote (7):

"7. Incorporating a railway company with power to exercise all the powers and privileges conferred by an earlier act incorporating another railway company does not confer upon the new corporation the immunity from taxation enjoyed by the earlier company under its charter."

Grant of Authority to Build Branch From Madison to Atlanta a Privilege, a Gratuity, and Not a Contract, Hence No Tax Immunity.

It appears in the case at bar shows that the line from Madison to Atlanta is 67 miles long.

Even though plaintiff's tax exemption upon an alleged contract entered into between the State of Georgia and the Georgia Railroad & Banking Company should be established, the alleged contract did not provide for the construction of a railroad from Madison to Atlanta, but in 1837 the General Assembly passed an Act, the material portions being:

"... And whereas, in pursuance of the views of said Act, (relative to the building of the State road), the Monroe Rail Road Company, and the Chattahoochee Rail Road Companies, have obtained the privilege, by acts of the Legislature, to connect their respective roads with said State Rail Road.

"SECTION 1. . . . That the said Georgia Rail Road and Banking Company, shall have the right, and they are hereby authorized and empowered to continue their railroad from the town of Madison, in Morgan County, to pass through or near Covington, in the County of Newton, to connect with and join the Rail Road, about to be constructed by the State, from the Tennessee line, near the Chattahoochee river, as contemplated by the Act recited in the foregoing preamble, and for that purpose the said Georgia Rail Road and Banking Company. shall have all the powers and privileges, rights and immunities in the construction of said branch from Madison, as aforesaid, to the said State Rail Road, as are contained in the several Acts heretofore passed, and now of force, constituting the charter of the Georgia Rail Road and Banking Company, as fully as if the said continuation had been originally a part of the Georgia Rail Road; and the said Acts shall extend to, and regulate the construction of said extended Road, hereby authorized to be constructed, in the same manner, and to the same extent and for the same purpose and uses, as the same have been used and applied to the Georgia Rail Road and its branch from the City of Augusta to the said town of Madisch."...

Attention is especially called to the fact that the "Powers, and privileges, rights and immunities" are allowed to the Georgia Rail Road and Banking Company only "in the construction of said branch." Applying the rule of strict construction to this alleged grant of immunity from taxation, and considering that the construction of the road was completed long years since (about 1845), it is readily seen that such an immunity would not today serve to exempt this part of said road from taxation at the rate now prescribed for other Railroads. Such immunity as the Railroad enjoyed by virtue of this statute most definitely ended when the construction was completed.

The immunity "in the construction" could not have referred to perpetual immunity from taxation but referred to the immunity from injunction in the road which previous acts had specifically granted to the corporation.

This Act was not granted for the purpose of benefiting the State, but was granted as a privilege for the benefit solely of the corporation. It was a gift, a gratuity; it was a privilege that the corporation itself was seeking.

This court will take judicial cognizance of the fact that the State was building what was called the State Road leading from what is now Atlanta to Chattanooga, connecting with other Railroads leading to the North and West, opening up a vast reservoir from which freight must be shipped to the Atlantic Coast. The court will also take judicial cognizance of the fact that there was a line of Railroads provided by the General Assembly running from Atlanta to Macon,

and still another from Macon to Savannah, furnishing direct communication with the Coast.

It was a matter of utmost necessity that the Georgia Railroad be connected with this State Road. For to do so meant that it would be able to share in all this vast amount of freight destined for Augusta, the head of navigation on the Savannah River and into the Carolinas, to the port of Charleston, and on to other ports up the Coast of the United States cut off from the West by the Appalachian Mountain chain.

Therefore, the corporation sought and received these benefits from the State, not as a part of the contract for which it would give value received, but as free gifts. If the privilege provided in the Acts of 1837 be a gift from the State to the corporation then, it is not a contract but is subject to be retaken at the will of the General Assembly.

This issue was made in the case of

Goldsmith vs. Georgia Railroad Company, 62 Ga. 485,

in which case the issue was raised by demurrer and the demurrer overruled by the lower court. But the case was reversed by the Supreme Court of Georgia on other grounds. We contend that this portion of the road is without any tax exemptions, even though the remainder of it should be exempt.

The Amending Act of 1837 Was Not a Contract.

The corporation made no agreements to build the road in question, nor to maintain it after it was built. There was absolutely no consideration for the grant of the privileges set out in the Act.

It will be noted that the Act of 1837 was an amendment to the Act creating the corporation.

The case of Southwestern Railroad Company vs. Wright, 116 U. S. 231, a case involving an amendment of an Act which had an exemption similar to that in the within case clearly brings out this issue: From this we quote:

"The language of the authority to build the mid from Cuthbert to Eufaula is somewhat different. There nothing is said about taxation, but that the original charter of the company did not give the right to build this part of the road is shown by the fact that this amendment was deemed necessary. In building this extension or branch the company was placed 'under the rules and restrictions' they were subjected to in building the original road; but that did not necessarily imply an exemption of this line from taxation to the same extent the old road was. That exemption was only for that road, and as the amending act does not in terms or by fair implication apply the exemption to the additional read which aws to be built under it, we must presume that nothing of the kind was intended, and that the state was left free to tax that road like other property. No rule is better settled than that a contract of exemption from taxation is never to be presumed. A surrender of the power to tax when claimed 'must be shown by clear and unambiguous language which will admit of no reasonable construction consistent with the reservation of the power.' Delaware Railroad Tax Case, 18 Wall. 207."

Again in the case of Wells vs. Mayor, etc. of Savannah, 181, U. S. 531, 21 S. Ct. 697, certain city lots under the ordinance of 1790 had been exempt from taxation for 100 years. The attack upon the exemption was carried to the United States Supreme Court.

"The payment of taxes on account of property otherwise liable to taxation can only be avoided by clear proof of a valid contract of exemption from such pay-

ment, and the validity of such contract presupposes a good consideration therefor. If the property be in its nature taxable the contract exempting it from taxation must, as we have said, be clearly proved. It will not be inferred from facts which do not lead irresistibly and necessarily to the existence of the contract. The facts proved must show either a contract expressed in terms, or else it must be implied from facts which leave no room for doubt that such was the intention of the parties and that a valid consideration existed for the contract. If there be any doubt on these matters, the contract has not been proven and the exemption does not exist. This has been many times decided by this court."

Other cases where the United States Supreme Court has construed acts of the General Assembly of the several states creating corporations or granting exemptions are as follows:

The West Wisconsin Railway Company, Plaintiff in error, vs. The Board of Supervisors of the County of Trempealeau,

23 S. Ct. 814, 815.

- "1. An exemption from state taxation, which is a mere gratuity, may be withdrawn whenever the State thinks it best for the public welfare.
- "2. A reasonable doubt, as to whether an exemption claimed amounts to a contract, is fatal to the claim. Prima facie, every presumption is against it."

Vicksburg, S. & P. R. Co., vs. Dennis, Sheriff, etc., 6 Supreme Reporter, page 625.

- "... In determining whether a statute of a state impairs the obligation of a contract, the Supreme Court must decide for itself the existence, and effect of the original contract, (although in the form of a statute), as well as whether its obligation has been impaired.
- "... The omission of the taxing officers of a state to assess, in previous years, certain property cannot control the duty imposed by law upon their successors, or

the power of the legislature, or the legal construction of the statute under which the exemption is claimed."

Tucker vs. Ferguson, 89 U. S. 816.

"... The provision of the 37th section of the Act of 1871, exempting the lands specified from local taxation until three years from the first of April 1871, which period has not elapsed, was not a contract. There was no consideration. The company was required to do nothing and did nothing in return. As between individuals the stipulation would belong to the category of nude pacts. It has no higher character because one of the parties was a State, the other a corporation, and it was put in the form of a statute. It was the promise of a gratuity spontaneously made, which might be kept, changed or recalled at pleasure."

The legislature had no power to contract away the sovereignty of the State.

It has been thus in Georgia since the Constitution of 1798 declared that the territory and "jurisdictional rights" of Georgia

"is now of right the property of the free citizens of this. State, and held by them in sovereignty, inalienable but by their consent."

and forbade the Legislature as follows:

"to which territory such power of contract or sale, by the legislature, shall not extend."

This was forcefully stated in the opinion of Judge Nicoll in the case of

The State, etc., vs. Dews, R. M. Charlton 397, decided at the January term, 1835, in which case a public official insisted that he had a property right to an office. We quote from the opinion of the court relative to public officers on page 401:

"As public agents, they are intrusted with the exercise of a portion of the sovereignty of the people—the jus publicum, which is not the subject of grant, and can be neither alienated nor annihilated, and it would be a repugnant absurdity, as incomprehensible as it would be revolting that they can have a private preperty in that sovereignty." (Italics supplied.)

Again, from page 414, we quote:

"Indeed with how much more force may it not be objected to such a proposition, that it is not adequate to the Legislature to grant to an officer privileges which impair or interfere with the powers necessarily and inseparably appertaining to the sovereign legislative power of the State, since it would violate the fundamental compact, the compact of the Constitution?"

This question arose in the case of

Hamrick vs. Rouse, 17 Ga. 56.

We quote from the opinion of Judge Starnes on page 60:

"... it is very certain that no Legislature has the right to bind all subsequent Legislatures, all posterity, as to any matter of mere political arrangement or expediency. The good faith of the State, or its people, under some circumstances, in a moral point of view, might become very decidedly pledged by the Legislature to such political arrangement; but still, as matter of contract, the Legislature could not bind posterity upon a subject of mere political expediency."

Again in the case of

Bailey vs. The State, 20 Ga. 742.

We quote from the opinion of Judge Benning on page 744:
"No legislature has a power to curtail or to contract

the power of a subsequent legislature."

The next case involving this question was that of

Daly vs. Harris, 33 Ga. Supp. 38.

We quote from pages 50 and 51:

"Again, it is true of all governments invested with legislative power for the common weal, that no Legislature can, by contract, divest either itself or its successors of any power necessary to the well-being of the State. The Presbyterian Church vs. The Mayor and Council of New York, 5 Cowen, 538; Cosler vs. Georgetown, 6 Wheaton, 593; Ohio Loan, Insurance and Trust Company vs. Debolt, 16 Howard, 431; (opinions of Chief Justice Taney and Mr. Justice Campbell). Hamrick vs. Rouse, 17 Georgia, 59, 60; Bailey vs. The State, 20 ibid. 744. Governments have, in themselves, no rights to be secured or interests to be protected. They are mere agencies established for the security of rights and the promotion of interests appertaining to the founders, who, by common consent, have become the governed. To this end, they have been invested with certain necessary powers, the exercise of which devolves upon different individuals, who, in the course of time, come successively into the government. If the depository of those powers for the passing hour, may alien any one of them, so as to deny itself and its successor the exercise of it, all of the others may be so aliened, and the result would follow, that an agency established by society for certain specified ends, may in its discretion, defeat those very ends, which would be contrary to first principles, and subversive of all government.'

We have been unable to find any variation from this line of decisions until 1875 when in the case of the State vs. Georgia Railroad and Banking Company, 54 Ga. 423, wherein no Georgia constitutional question was raised, Judge McCay wrote an opinion completely at variance with all the foregoing precedents established by the Supreme Court of Georgia.

This decision was made without considering the Georgia Constitution. Counsel for the State did not raise the question as to whether this provision of the Act was unconstitutional as measured by the Constitution of the State of Georgia. This is brought out by the record of the case which shows that Attorney General Hammond and Attorney Robert Toombs raised no constitutional questions in either the superior court or in the bill of exceptions to the Supreme Court. This being the case, what the court had to say about the powers of the General Assembly to enact such laws is mere obiter dicta.

Plaintiff Has Ample Remedies at Law in Which to Test Its Rights Under the Charter, To-Wit:

- 1. Arbitration ad appeal on valuation assessment.
- 2. Appeal from the order levying the taxes. . .
- 3. Affidavit of illegality,
- 4. Payment of taxes due State and suit for refund.

1. Appeals:

It will be noted that the State Revenue Commissioner is required to take two steps relative to taxes of railroads. First, he must assess the valuation of the property of the railroad company which assessment of valuation is subject to arbitration and appeal to a jury in the Superior Court. (Code Section 92-8426 (e). Second, when the valuation is fixed, then he must assess or levy the taxes. This order levying the taxes is subject to appeal to the Superior Court in which every defense plaintiff might have could be determined by the court. (Code Section 92-8426 (d)).

2. Affidavit of Illegality:

Under the Act of 1943, pp. 204, 206, it is specifically provided that "all final rulings, orders and judgments of the State Revenue Commissioner shall be subject to appeal and review" in the Superior Court. We quote the following from the same Act:

"Provided, however, that nothing herein contained and no provision of this law (Sections 92-8426 (d) to 92-8426 (f) shall be construed to deprive a taxpayer

against whom an execution for taxes has been issued under an assessment by the State Revenue. Commissioner of the right to resist enforcement of the same by affidavit of illegality."

3. Suit for Refund:

Insofar as the taxes collected by the State are concerned, Code Section 92-8435 provides for suit against the Commissioner of Revenue for any taxes illegally collected. In such suit all reasons why the taxes were illegal can be litigated.

We thus see that the State has provided plaintiff four separate and distinct methods in its own courts wherein litigation between plaintiff and the State is authorized, in three of which all of plaintiff's contentions can be pleaded.

The State Can Forbid Injunctions to Its Own Courts

When the State provides means through which persons aggrieved can have ample redress through legal actions, it can forbid the use of injunctions. The State, having provided these remedies, has denied to its taxpayers any other means of litigating with it.

Code Section 92-8445 specifically forbids injunction in such cases as follows:

"Appeal from Commissioner's findings; petition; supersedeas; evidence; decision.—The Commissioner's assassment shall not be reviewed except by the procedure hereinafter provided. No trial court shall have jurisdiction of proceedings to question such assessments, except as in this Chapter provided."

The foregoing was construed in Forrester, Rev. Com'r. vs. Pullman Co., 66 Ga. App. 745.

"The method of reviewing the tax assessment of the Commissioner of Revenue is prescribed by our Code, 92-8446, and procedure therein is exclusive, and no trial court shall have jurisdiction of proceedings to

question such assessments, except as in this chapter provided."

In the case of.

Whiddon vs. State Revenue Commission, 184 Ga. 453, 191 S.E. 438

the court held that the plaintiff had an adequate remedy at law by interposing the affidavit of illegality on the levy of the execution and that an injunction should not issue to restrain the enforcement of the execution, on the grounds that plaintiff was exempt from the taxes levied.

Wherefore,

Intervenors respectfully pray that this court examine carefully the iniquitous tax exemption claimed by Appellant and hold that it is void, because:

- 1. Redenies to all the people of Georgia, the equal protection of the laws as guaranteed by the 14th Amendment.
- 2. The people of Georgia had the right to adopt the Constitution of 1945, abolishing all such exemptions.
- 3. That the Appellant lost any exemption it might have had when it failed to carry out its contract and build the railroads specified by the charter.
- 4. That the charter of the Georgia Railroad and Banking Company of 1835 did not contain any tax exemption.
- 5. That the branch of the railroad from Madison to Atlanta has never been granted any tax exemption.

And that by reason of these holdings by the United States Supreme Court the Jadgment of the court below should be sustained. Respectfully submitted, by the following Counties and municipalities:

Signed

Victor Davidson, Irwinton, Ga. Special Attorney for Intervenors.

MORGAN COUNTY
OGLETHORPE COUNTY
GREEN ECOUNTY
CITY OF GREENSBORO
CITY OF UNION POINT

4

Jos. G. Faust, Attorney Greensboro, Ga.

WARREN COUNTY Joe H. Terrell, County Attorney Warrenton, Ga.

CLARKE COUNTY Carlisle Cobb, County Attorney
Athens, Ga.

McDUFFIE COUNTY J. Glenn Stovall, County Attorney
Thomson, Ga.

NEWTON COUNTY C. C. King, County Attorney
Covington, Ga.

FULTON COUNTY Standish Thompson, Attorney
Atlanta, Ga.

ROCKDALE COUNTY J. H. McCalla, Dempsey W. Leach, Attorneys, Conyers, Ga

WALTON COUNTY Roberts and Roberts, Attorneys
Monroe, Ga

DEKALB COUNTY Julius A. McCurdy, County Attorney
Decatur, Ga

TOWN OF RUTLEDGE A. F. Jenkins, Attorney Madison, Ga.

TALIAFERRO COUNTY Osgood O. Williams,
County Attorney, Crawfordville, Ga.

BURKE COUNTY.

E. M. Price, County Attorney Waynesboro, Ga

CITY OF MADISON, COLUMBIA COUNTY

J. F. Hardin, County Attorney Augusta, Ga.

TALBOT COUNTY

J. A. Smith, Attorney
Atlanta, Ga.

CITY OF MACON

Ed Sells, City Attorney Macon, Ga.

TAYLOR COUNTY CITY OF REYNOLDS CITY OF BUTLER

J. R. Lunsford, Attorney Butler, Ga.

PEACH COUNTY
PEACH COUNTY
BOARD OF EDUCATION
CRAWFORD COUNTY

Sam M. Matthews, Attorney Ft. Valley, Ga. I, Victor Davidson, Special Attorney for Intervenors, Amici Curiae, certify that I have this day served a copy of the within brief on Hon. Eugene Cook, Attorney General of Georgia, Counsel for Appellee, and on Hon. Robert B. Troutman, Hon. Furman Smith, and Spalding, Sibley, Troutman & Kelly, Counsel for Appellant, by mailing copies of same to their addresses.

This day of January, 1950.

Victor Davidson
Special Counsel for Intervenors,
Amici Curiae

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Office Supreme Court, U.S.

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SUPREME COURT OF THE UNITED STATES
October Term, 1951

No. 1

GEORGIA RAILROAD & BANKING COMPANY
Appellant

VS.

CHARLES D. REDWINE, STATE REVENUE COMMISSIONER

Appellee

BRIEF IN OPPOSITION TO MOTION OF APPELLANT TO TERMINATE THE CONTINUANCE BY INTERVENORS -AMICI CURIAE

> Victor Davidson, Irwinton, Ga. Special Attorney for Intervenors.

MORGAN COUNTY
OGLETHORPE COUNTY
GREENE COUNTY
CITY OF GREENSBORO
CITY OF UNION POINT
Jos. G. Faust, Attorney,
Greensboro, Ga.
WARREN COUNTY
Joe H. Terrell, Attorney,
Warrenton, Gs.
CLARKE COUNTY
Carlisle Cobb, Attorney,
Athens, Ga.
McDUFFIE COUNTY
J. Glenn Stovall, Attorney,
Thomson, Ga.
NEWTON COUNTY
C. C. King, Attorney,
Covington Ga.
ROCKDALE COUNTY
William T. Dean,
J. H. McCall, Attorneys,
Conyers, Ga.

WALTON COUNTY A. M. Kelley, Attorney, Monroe, Ga.

DeKALB COUNTY Julius A. McCurdy, Attorney, Decatur, Ga.

CITY OF MADISON

TOWN OF RUTLEDGE A. F. Jenkins, Attorney, Madison, Gr.

TALIAFERRO COUNTY
Osgond O. Williams, Attorney,
Crawfordville, Ga.

J. F. Hardin, Attorney, Augusta, G.

CITY OF AUGUSTA, William P. Congdon, Attorney, Augusta, Ga.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1951

No. I

GEORGIA RAILROAD & BANKING COMPANY, Appellant,

VS.

CHARLES D. REDWINE, STATE REVENUE COMMISSIONER,

Appellee

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Intervenors Amici Curiae urgently pray that Appellant's Motion to Terminate the Continuance be denied for the reasons hereinafter set out.

Said Intervenors are the main parties at interest in this effort to collect taxes. The taxing subdivisions being entitled to receive all these taxes except approximately \$70,000.00 and interest thereon due the State of Georgia.

REASONS FOR DENIAL OF MOTION

The Motion shows that Appellant has deliberately failed to comply with the order of this court entered February 20, 1950:

"Per Curiam: Inasmuch as the Attorney General of Georgia stated at the bar of this Court that plain, speedy and efficient state remedies, were available to appellant, the cause is ordered continued for such period as will enable appellant with all convenient speed to assert such remedies."

and refused to avail itself of the methods provided by the laws of Georgia for the assertion of its remedies in the particulars hereinafter set out. It shows that Appellant has failed to avail itself of the Remedy of:

- (a) Affidavit of Illegality.
- (b) Making a Partial Payment of the Taxes and Suing of for Refund.

We most respectfully urge that this question as to exemption claimed by Appellant should be determined by the courts of Georgia, and jurisdiction should not be assumed by the Federal Courts until Appellant has exhausted its State remedies. Of the three or four remedies argued by the State Attorney General before this court in January of 1950 as being available to Appellant, Appellant has used only one, that of appeal from the assessment by the State Revenue Commissioner. The Supreme Court of Georgia in a split decision held that appeal was not available as a remedy, three judges dissenting, including the Chief Justice. The Superior Court of Richmond County having held that the Appellant had no tax exemption.

REMEDY BY AFFIDAVIT OF ILLEGALITY

Appellant's Motion fails to state any valid reason why it has not used the remedy of Affidavit of Illegality. This is specifically provided by Code Section 92-8426-4 P.P. Annotated Code of Georgia, as amended by the Act of 1943, which is as follows:

"Provided, however, that nothing herein contained, and no provision of this law (§§ 92-8426,4 to 92-8426.6), shall be construed to deprive a taxpayer against whom an execution for taxes has been issued under an assessment by the State Revenue Commissioner of the right to resist enforcement of the same by affidavit of illegality."

Appellant's Motion likewise fails to show that when the Appeal was made of this case from the District Court for the Northern District of Georgia to the Supreme Court of the United States, it applied for and obtained an injunction against Appellee pending the Appeal, so that Appellee has his hands tied and can take no further steps towards collecting the taxes in issue, a copy of the injunction and the modification being attached in the Appendix, page 8.

Intervenors have never had their day in court as a legal party to any litigation concerning this alleged tax exemption. Under the laws of Georgia, the taxing subdivisions can take no steps towards collecting these taxes until an execution is issued and sent to them by the State Revenue Commissioner, and then they can have the sheriff or other levying officer to make a levy. Appellant with its injunction has thus denied Intervenors Amici Curiae due process of the law by preventing them from obtaining the executions to levy. The other taxpayers of these subdivisions are thus being forced to bear all the burdens of government and are denied the equal protection of the laws guaranteed by the Fourteenth Amendment. If Appellant is seeking an early decision, then why does it not modify the injunction and permit Appellee to proceed with his executions and allow Intervenors Amici Curiae to test out their rights?

SUIT FOR REFUND OF TAXES

The Motion to terminate the Continuance fails to allege that Appellant has availed itself of the remedy of a suit for refund. Code Sections 92-8436 P.P. Annotated Code

of Georgia authorizes suits for refund of taxes illegally or erroneously collected. There is nothing to prevent Appellant from making a small partial payment of the taxes assessed and immediately afterwards filing suit for refund of them.

We remind the court that this is the second motion Appellant has filed to terminate the continuance, the other having been filed even while the appeal was pending in the courts of Georgia. For some reason Appellant seems to want to avoid a decision by the courts of Georgia.

If Appellant is really desirous of an early decision by the sourts so as to stop the interest, and will have the injunction modified so that the State Revenue Commissioner can issue and send to Intervenors only enough executions to test out the issues, Intervenors will have a levy made by their levying officers the same day the executions are received and Appellant can file its affidavit of illegality at once and a decision can be made without delay.

Intervenors carnestly pray this court to consider their rights and the rights of thousands of their citizens, even though neither are allowed by the laws of Georgia to become parties to this case.

Respectfully submitted by the following Counties and municipalities:

Signed

Victor Davidson, Irwinton, Ga.

Special Attorney for Intervenors.

MORGAN COUNTY OGLETHORPE COUNTY Jos. G. Faust, Attorney, GREENE COUNTY Greensboro, Ga. CITY OF GREENSBORO CITY OF UNION POINT Ioe H. Terrell, Attorney, WARREN COUNTY Warrenton, Ga. Carlisle Cobb, Attorney, CLARKE COUNTY. Athens, Ga. I. Glenn Stovall, Attorney, McDUFFIE COUNTY Thomson, Ga. C. C. King, Attorney, **NEWTON COUNTY** Covington, Ga. ROCKDALE COUNTY William T. Dean, J. H. McCalla, Attorneys, Convers, Ga. A. M. Kelley, Attorney, WALTON COUNTY Monroe, Ga. Julius A. McCurdy, Attorney, DeKALB COUNTY Decatur, Ga. CITY OF MADISON A. F. Jenkins, Attorney, TOWN OF RUTLEDGE Madison, Ga.

TALIAFERRO COUNTY Osgood O. Williams,
Attorney, Crawfordville, Ga.

COLUMBIA COUNTY J. F. Hardin, Attorney, Augusta, Ga.

CITY OF AUGUSTA William P. Congdon, Attorney, Augusta, Ga.

APPENDIX

Injunction Against Appellee

IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF GEORGIA NEWNAM DIVISION

GEORGIA RAILROAD & BANK-, ING CO.

CIVIL ACTION

CHARLES D. REDWINE, STATE REVENUE COMMISSIONER No. 185

ORDER GRANTING INJUNCTION PENDING APPEAL

It appearing to the Court that complainant in the above stated case is appealing from the judgment of this Court entered August 10, 1949, dismissing the complaint, and that defendant is proceeding to levy the tax sought to be enjoined pending the appeal and will proceed to levy and collect such tax unless restrained, and it appearing that such levy and collection pending appeal may irreparably damage complainant and that the grant of such injunction pending appeal will not damage defendant, since the tax, if due, is a first lien on all property of complainant and bears interest at 7% per annum,

IT Is THEREFORE ORDERED that defendant be enjoined until final determination of the appeal of complainant, or until further order of this Court, from assessing or collecting any tax, except as provided in the charter of complainant, on the line of complainant between Augusta, Georgia, and Atlanta, Georgia, the line between Union Point and Athens, Georgia, and all appurtenances thereto.

The injunction hereby issued shall not become effective unless and until the complainant, within ten days from the date hereof, files with the Clerk of this Court in this cause,

and to be effective in any and all subsequent litigation, a stipulation waiving on behalf of the taxing authorities of Georgia the benefit of any statute of limitations from this date forward, to the same extent and effect as if the State had levied at this time the tax fi. fa. Upon the filing of such stipulation the injunction shall be and become effective in accordance with its other terms.

This the 3rd day of October, 1949.

. 8

LEON McCord
United States Circuit Judge

ROBERT L. RUSSELL
United States District Judge

F. M. SCARLETT
United States District Judge

In 1950 the above injunction was amended as follows:.

Order Modifying Injunction Pending Appeal

* The Supreme Court of the United States on appeal having entered the following order:

"Inasmuch as the Attorney General of Georgia stated at the bar of this Court that plain, speedy and efficient state remedies were available to Appellant, the cause is ordered continued for such period as will enable Appellant with all convenient speed to assert such remedies,"

It is hereby ordered that the injunction pending appeal entered on October 2, 1949, be and the same is hereby modified in the following respects:

- 1. The defendant, Charles D. Redwine, who is State Revenue Commissioner of Georgia, is permitted to proceed to assess the valuation of the property of plaintiff, Georgia Railroad & Banking Company, and to assess the ad valorem taxes claimed by him to be due on plaintiff's property.
- 2. The defendant, Charles D. Redwine, who is State Revenue Commissioner, shall be permitted, however, to issue executions against plaintiffs on such assessment only in the event Plaintiff fails to take an appeal or undertake to appeal from such assessment (whether such appeal be validly taken or not) to the Superior Court of Georgia in the manner provided by the statute of Georgia."

I, Victor Davidson, Special Attorney for Intervenors, Amici Curiae, certify that I have this day served a copy of the within brief on Honorable Eugene Cook, Attorney General of Georgia, Counsel for Appellee, and on Honorable Robert B. Troutman, Honorable Furman Smith, and Spalding, Sibley, Troutman & Kelly, Counsel for Appellant, by mailing copies of same to their addresses.

This ___ day of September, 1951.

Victor Davidson
Special Counsel for Intervenors
Amici Curiae

JERARY U.S.

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Office-Segrence Court, M. S.

SUPREME COURT OF THE UNITED STATES

October Term, 1951

No. 1

GEORGIA RAILROAD & BANKING CO., Appellant,

WS.

CHARLES D. REDWINE, State Revenue Commissioner, Appellee

BRIEF AMICI CURIAE FOR APPELLEE

VICTOR DAVIDSON, Irwinton, Ga. Jos, G. FAUST, Greensboro, Ga. TOEL H. TERRELL, Warrenton, Ga. CARLISLE COBB. Athens, Ga. JAMES BARROW, Athens, Ga. I. GLENN STOVALL, Thomson, Ga. C. C. KING, Covington, Ga. HAROLD SHEATS, Atlanta, Ga. STANDISH THOMPSON, Atlanta, Ga. WILLIAM T. DEAN, Convers, Ga. I. H. McCALLA, Convers, Ga. A. M. KELLEY, Monroe, Ga. ROBERTS & ROBERTS, Monroe, Ga. JULIUS A. McCURDY, Decatur, Ga. A. F. JENKINS, Madison, Ga. OSGOOD O. WILLIAMS, Crawfordville, Ga. I. F. HARDIN, Augusta, Ga. W. P. CONGDON. Augusta, Ga. Of Counsel Employed by Parties. at Interest.

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SUPREME COURT OF THE UNITED STATES

October Term, 1951

No. 1 .

GEORGIA RAILROAD & BANKING COMPANY, Appellant,

appellant,

CHARLES D. REDWINE, State Revenue Commissioner,

Appellee

BRIEF AMICI CURIAE FOR APPELLEE

This case is of such vital importance to the Counties, municipalities, and school districts through which the rail-road runs which is sought to be taxed, that we respectfully request that we be permitted to file this supplementary brief.

It is the small taxpayers of these governmental subdivisions which are having to bear all the burdens of government, this being the only railroad lying in most of the subdivisions, and hence being, in most cases, the only large property owner. Because of this, we urgently pray this court to consider most carefully the prayers of these subdivisions, that this corporation be required to bear its pro rata share of the burdens.

SUPPLEMENTARY STATEMENT OF CASE

Since this case has been pending in this court, a decision on the question has been rendered by the Superior Court of the Augusta Circuit. While we do not attempt to say that this Court would be bound in any way by the decision, yet,

Judge Anderson made such an exhaustive study of the tax exemption, that we feel that this court would be interested in reading his reasoning on the issues involved, which he set forth in a lengthy opinion, and which opinion we attach in the Appendix.

Appellee Is A Party In Two Capacities .

Appellee in this case is acting in two separate and distinct capacities:

First, as the official charged with assessing the entire value of the taxable property of plaintiff in error and assessing the State taxes thereon;

Second, as the official charged with assessing the taxes due the taxing subdivisions of the State.

In 1874, the Comptroller-General became the official charged with the first of these capacities.

In 1889, the Comptroller-General became the official charged with the second of these capacities. He continued to serve in both these capacities until the State Revenue Commissioner succeeded to these duties.

For many years prior to 1833 and continuing to the present, counties and municipal corporations have been treated as distinct corporations, separate and distinct from the State as entities, charged with the performance of the greater portion of governmental duties, and endowed with a portion of the sovereign powers of the State in order to be able to perform these governmental duties. As for counties, more than one Supreme Court decision had called them corporations or quasi corporations and section 463 of the code of 1861 definitely declared them corporations. Prior to that code, the general laws allowed these counties to tax only their inhabitants, corporations not being inhabitants but this code eliminated that limitation. The Constitution of 1868 endowed them with the power to tax property, ad valorem, but no machinery was provided for them by which

they could apply their tax to railroad corporations. Under their charters the municipal corporations likewise were unable to tax such corporations because of the lack of the necessary legal machinery by which to apply their tax.

When the case of Georgia v. Georgia Railroad & Banking Co., 34 Ga. 423, came on for trial in 1874, the rights of these governmental subdivisions were not in issue and they had no official representative charged with the duty of representing their interests made a party. Having acquired their rights to tax property ad valorem prior to the judgment rendered in this case, they were not privy to the State in that judgment regardless of whether the State was bound or not as res judicata. Hence, they did not have their day in court in that case.

When the case of Georgia Railroad and Banking Company v. Wright, Comptroller-General, 132 Fed. 912, 216 U.S. 420, came on for judgment in 1907, that action being against Wright in his individual capacity and not against him his official capacity, their rights could not be legally determined. Hence, they did not have their day in court in that case.

Taxability by State and Taxability by Governing, Subdivisions Entirely Different ssues

We most earnestly urge this court to ensider separately and distinctly the question as to whether the State can tax, from the question as to whether the subdivisions can tax this corporation.

Different principles of law affect each of these taxing entities. One principle or doctrine might affect the State's power to tax or right to enforce the tax, and flight not affect the subdivisions. For example, a tax exemption might have been given as to one, and withheld a to the other. Again, the doctrine of res judicata, might be held by the court to apply to one and yet not to the other.

BRIEF OF LAW AND ARGUMENT Intervenors Not Bound By Prior Decisions

The taxing subdivisions were not parties nor privies in the case of Georgia v. Georgia Railroad & Banking Co., 54 Ga. 423. Nor were they legally, parties or privies when the case of Georgia Railroad & Banking Co. v. Wright was decided in 132 Fed. 912, and 216 U. S. 420.

In the first case, there was no effort to tax the company for the governing subdivisions. In the second case, the action was against Wright in his individual capacity, and, hence the subdivisions were not legally parties thereto.

In Mayor, etc. of Forsyth v. Hooks, 182 Ga. 78, 184 S.E. 724, the Supreme Court held that a subdivision of the State Government as trustee for the interests of the people cannot be bound by litigation to which it was not a party.

50 C.J.S. 336, Section 796 Judgments under the heads of States, Counties and Municipal Corporations points out how far judgments against State or State official bind subordinate political subdivisions and vice versa, and shows conclusively that the subdivisions are not bound under the doctrine of res Judicata.

In

Bank of Kentucky v. Kentucky, 20 U.S. 258, 52 L.E., 197,

the Supreme Court of the United States conclusively sustains our contentions on this point. In that case Jefferson County was attempting to tax a corporation, which was chartered in 1834, and granted an exemption. State officials provided the machinery for assessing the tax. The corporation pleaded as rest judicate a prior decision against state officials involving taxes claimed by Franklin County and the Clty of Louisville in which the court held that the State had a binding contract with the corporations, by which it exempted the company from state taxes and further held

that it could be taxed for county and municipal purposes only upon its real estate used by it in conducting its business. The court rejected this plea of res judicata and held that:

"A person or a municipality is not bound by former litigation, unless it was a party, either actually or by its representative."

We, therefore, urge that the decisions in other cases which have heretofore been before the courts should not be binding on these subdivisions, but that, as to them, each issue raised in the present case should be considered as an entirely new question unhampered by previous decisions.

Appellant Estopped by Judgment to Claim A Judgment As to Taxes For One Year Is Res Judicata As to Taxes for Other Years

Under the doctrine of estoppel by judgment, Appellant is bound by the judgment in the case of Georgia Railroad/& Banking Company v. Wright, 124 Ga. 596, and by the judgment of the same case in 125 Ga. 589, when it reached the Supreme Court on its merits.

This was a case where the Comptroller-General acting in his dual capacity just as the present Appellee is acting: in his official capacity to collect State taxes, and second, in his official capacity as agent for the collection of the taxes of the Counties and Municipalities, was the defendant and the present Appellant was plaintiff. In this case, this company sought to enjoin the collection of taxes due the State and subdivisions on certain stock owned/by it. The Comptroller-General pleaded as res judicata a case which had been rendered by the Supreme Court of the United States for taxes due for the year 1900. The present Appellant presented and urged the issue setting up the principle of law that judgments relative to taxes for one year is not res judicata as to actions for taxes for other years. This company prevailed in the decision and the Supreme Court of Georgia concurred as follows:

"2. A suit to enjoin the collection of taxes for one year is no bar to a suit to enjoin similar taxes for another year. This is so because the taxes for each year constitute a separate cause of action." (Lumpkin, J., dissenting.)

It also held

"... either party is estopped on the question of ... taxability except for the year 1900."

Three months later when the same case came back to this court as reported in the 125 Ga. 589, this same court said:

"The foregoing discussion disposes of all the questions made in the record, which in our opinion, are not concluded by the former opinion. The rulings in the former decision are affirmed and adhered to. Upon further consideration and reflection, they are altogether satisfactory..."

"All the Justices concur."

These were two judgments between the identical parties at interest in the present case and the present Appellant in which the last judgment made the first unanimous. It invoked and obtained in its favor and against these parties at interest the very judgments it now attempts to attack. As judgments between the identical parties, the doctrine of estoppel by judgment applies and Appellant is estopped to plead that judgments as to taxes for one year is res judicata as to taxes for other years.

Even though the taxing subdivisions had been bound by the judgment against the State of Georgia in the 54th Georgia, these judgments holding that even though the question of taxability for the year 1900 had been the issue when the case was decided in the United States Supreme Court the same questions of taxability could be again raised in cases involving taxes for other years.

The Supreme Court of the United States most likely rec-

ognized this estoppel when the case of Wright v. Georgia Railroad & Banking Company was before it in 216 U.S. 420 and refused to consider the 54th Georgia res judicata.

The District Court Was Correct In Holding That The Judgment In The 132 Fed. 912 and 216 U.S. 420 Was Not Res Judicata As To Taliaferro County.

Appellant's Counsel did not raise the question in its first brief as to whether Taliaferro County was bound by the decision in the above cases under the doctrine of res judicata, but have done so in their last brief. In answer to their argument we call attention to the fact that the attempt by the authorities of this county to intervene and be made a party in said cases was ultra vires, and any judgment rendered against the county by virtue of such suit was void.

Code Section 23-1502 provides:

"A County is not liable to suit for any cause of action unless made so by statute."

We quote from

Monroe Co. v. Flynt, So Ga. 489

"... counties of the state are political subdivisions, exercising a part of the sovereign power of the state; they cannot be sued except where it is so provided by statute."

As a corollary to the above Code Section, the county authorities have no power to waive that element of sovereignty and consent to a suit on a cause of action against the county not provided by law, any more than did Comptroller-General Wright have any right to bind the State by his pleading in the Federal Court, And, any judgment rendered in such an attempt by the county authorities is void.

There was no provision of law which authorized counties to engage in such litigation relative to taxes, or to ask for a declaratory judgment relative to their rights of taxation. Specific machinery had been provided for the assessing of tax values of railroads, the levying of taxes by counties, the assessing of these county tax levies by the Comptroller-General, and the litigation relative to these county tax levies, in Code Sections 92-2604, 92-2705 and 92-2706.

The Doctrine of Stare Decisis Does Not Require This Court to Follow 54 Ga. 423 in Determining the Rights of the Counties, Municipalities and School Districts.

The record of the 54th Georgia set forth in Appellant's petition shows that the only evidence introduced was the Act of 1833. Neither the Act of 1835 nor the Act of 1837 was introduced, nor were they considered at all by the Supreme Court in its decisions, as to whether the tax exemption was continued by the Act of 1835, or whether the Act of 1837 provided any tax exemption in perpetuity to the branch from Madison to Atlanta. The decision was limited to a point of law and not binding as stare decisis.

We submit that the decision in the 54th Georgia was a great and glaring error, and this court should not perpetuate such an error by following it. The great Judge Bleckley in

Ellison v. Georgia, 87 Ga. 697, said:

"... the only treatment for a great and glaring error affecting the current administration of justice in all courts of original jurisdiction, is to correct it. When an error of this magnitude, and which moves in so wide an orbit competes with truth in the struggle for existence, the maxim of a supreme court, supreme in the majesty of duty as well as in the majesty of power, is not stare decisis, but fiat justitia ruat coelum."

We, also, quote from 21 C.J.S. 323, Courts Sec. 193:

"Rule not Applied to Perpetuate Error.

"Previous decisions should not be followed to the extent that grievous wrong may result; and, accord-

ingly, the courts ordinarily will not adhere to a rule or principle established by previous decisions which they are convinced is erroneous.

"The rule of stare decisis is not so imperative or inflexible as to preclude a departure therefrom in any case, but its application must be determined in each case by the discretion of the court, and previous decisions should not be followed to the extent that error. may be perpetuated and grievous wrong be the result."

15 R.C.L. 957 Judgments, Section 433.

"... the recovery of judgment for a cause of action under an unconstitutional statute in a suit in which the constitutionality of the statute is not brought in question does not estop the party in whose favor the judgment is rendered from setting up the unconstitutionality of the statute in a subsequent action between the same parties upon a different cause of action." Citing Philadelphia v. Ridge Ave. R. Co., 142 Pa. St. 484, 21 Atl. 982.

We quote from 7 Ruling Case Law 1008, 1009, 1010 Courts, Section 35:

"35. Propriety of Departure from Doctrine of Stare Decisis.—If judges were able, conscientious, and infallible; if judicial decisions were never made except upon mature deliberation, and always based upon a perfect view of the legal principles relevant to the question in hand, and if changing circumstances and conditions did not so often render necessary the abandonment of legal principles which were quite unexceptionable when enunciated, the maxim stare decisis would admit of few exceptions. But the strong respect for precedent which is ingrained in our legal system is a reasonable respect which balks at the perpetuation of error, and it is the manifest policy of our courts to hold the doctrine of stare decisis subordinate to legal reason and justice, and

to depart therefrom when such departure is necessary to avoid the perpetuation of pernicious error. . . . If, ... a decision or series of decisions are clearly incorrect, either through a mistaken conception of the law, or through a misapplication of the law to the facts, and injurious results would follow from their overthrow, and especially if they were injurious or unjust in their operation, it is the duty of the court to overrule such cases. Hasty or crude decisions should be examined without fear and reversed without reluctance. While it is true that long acquiescence in an erroneous decision, so that it has become a rule of property or practice, may raise it to the dignity of law, yet it must not be understood that a previous line of decisions affecting even property rights can in no case be overthrown . . . where the decision goes to the merit of the controversy, where the whole rights of parties is dependent upon and is governed by it, in such case, if the court should, from any cause, have erred, it is not only proper, but it is an obligatory duty upon them, a duty imperiously demanded by litigants whose rights are before them for adjudication, to re-examine the opinion so pronounced, and, if found to be erroneous, to recede from it. In the matter of constitutional provisions it has been held that while courts recognize to the fullest extent the necessity for the stability, consistency, and a firm adherence to the doctrine of stare decisis in passing upon and construing any provision of the organic law, yet if an error has been committed. and becomes plain and palpable, they will not decline to correct it, even though it may have been reasserted and acquiesced in for many years."

We quote the following from the case of

Hendricksen v. Seaward, 135 F. (2d) 986 of 150 ALR 5:

"... Thus in tax controversies of this character, when the courts undertake to bestow on either party.

a vested right in an erroneous decision of law, they are apt, by multiplying the issues, merely to add fuel to the controversy...."

The Decision in the 54th Georgia Based on Mistaken Assumptions

The decision in the 54th Georgia was based on the mistaken assumptions that section 15 of the act of 1833 was valid, was constitutional as measured by the Constitution of Georgia, was not ambiguous, that the company had performed all the duties imposed by the charter, and that the Legislature of Georgia had the power to grant tax exemptions in perpetuity, that the exemption applied to all branches of the road.

A very interesting discussion of the subject "Res Judicata Re-Examined," by Edward W. Cleary, is found in the January 1948 issue of the Yale Law Journal. We quote from footnote No. 21, page 342, of the Journal as follows:

"E.g., Ohio Life Insurance Co. v. Board of Education, 387 Ill. 159, 55 N.E. 2d (1944), where plaintiff in a former action had obtained judgment in the federal district court for interest due on bonds. Subsequently plaintiff sued in the state court for the principal of the bonds and was met with the defense of invalidity of the statute purporting to validate the bond issue. The court pointed out that while the complaint in the first cast relied upon the validating statute, no question was actually raised as to its validity and judgment was entered upon the assumption that the statute was valid. Estoppel was held not to apply.

By reason of this principle of law, the decision of the 54th Georgia could not affect the taxing subdivisions, and more especially those along the branch road from Madison to Atlanta.

Wilmington & W. R. Co. v. Alsobrook, 146 U.S. 279, 13 Sup. Ct. Rep. 72: that

A judgment that a railroad company's franchise and rolling stock are included in an exemption of all its property is not conclusive of the question whether such exemption extends to a branch road.

If the rule for construction of tax exemption statutes as was laid down by the United States Supreme Court in the case of the Atlantic Coast Line Railroad Company v. Phillips, Commissioner, 332 U.S. 168, to-wit:

"A Legislature is not to be presumed to have relinquished its power of taxation beyond the narrowest rational reading of an exemption."

is sound, then we urge that this same rule should apply in the construction of a judgment when the judgment is pleaded as res judicata.

The Supreme Court of Georgia Overrules Former Decisions Holding That Where Tax Exempt Funds Are Invested in Other Property, The Exemption Attaches to Other Property.

The former decisions in the Georgia Supreme Court holding that where stock exempted from taxation by charters was invested in tangible property, this property likewise became exempt, were based on the fallacious theory that the exemption followed the investment and attached to the property in which it was invested: Running throughout the Georgia decisions from the earliest times we find this principle of law strongly in evidence.

However, the case of

City Council of Augusta v. Ransom, 179 Ga. 180, 175 S.E. 497

is a complete about face.

It is now the law of Georgia that tax exempt funds when invested in non-exempt property lose the tax exemption.

As applied to the tax exemption in the case at bar, the plea that the capital stock of this company when it was invested in property used for a railroad became exempt can no longer be sustained as the law of Georgia. Therefore, as against the taxing subdivisions unaffected by decisions to the contrary, in other cases, the Appellant has no tax exemption on property in which the capital stock was invested.

The Stock Tax Limitation in the Act of 1833 Was a State Tax Limitation. Other Taxes Not Prohibited.

The charter of the Central Railroad & Banking Company of 1835 provided

"The railroad and its appurtenances shall not be subject to be taxed higher than ½ of 1 per cent upon its annual income; second, no municipal or other corporation shall have the power to tax the stock of said corporation; third, but such municipal or other corporation may tax any property, real or personal of the said company within the jurisdiction of said corporation in the ratio of taxation of like property."

This act was approved just four days before the act of 1835 amended the charter of the Georgia Railroad and Banking Company was approved, and we think more clearly than anything else shows conclusively that it was in the minds of the legislature in providing for the exemption of stock of the latter corporation merely to limit the state taxation. The Supreme Court of the United States so construed the above exemption in the case of Central Railroad & Banking Company v. Wright, 164 U.S. 327 41 L. E. 454, and is of especial importance in the case at bar respecting the rights of the Counties, Municipalities and School Districts. Mr. Justice Brown begins the opinion with:

"This case raises the question, frequently presented to this court of the power of the state to impose upon a corporation a tax not provided for or contemplated, nor yet expressly forbidden, in its original charter"...

Referring to the provisions of the above exemption he continues:

there is an express prohibition against the municipal taxation of the 'stock' of the company and an express permission to tax any 'property of the company within the jurisdiction of the corporation . . . The 1st clause. was obviously intended as a limit upon state taxation; the second as a prohibition upon the powers of municipalities to tax the shares of stock held by its citizens; the third, as an express permission to tax any property of the company within its jurisdiction for local purposes . . ." (Emphasis supplied.)

In Bailey v. Magwire, 89 U.S. 215, 22 L. E.: 850, the Supreme Court of the United States construed a tax exemption of a railroad which referred to State taxes but did not mention county and municipal taxation, and held that under such exemption counties and municipalities could tax.

The taxes levied by the counties, municipalities and school districts of today "were not provided for, or contemplated, nor yet expressly forbidden" by the act of 1833 creating the Georgia Railroad Company. As of that date counties and municipalities had been given no power to levy taxes on corporations. They were limited to the taxation of their respective inhabitants and a corporation did not come under the category of an inhabitant of a county or municipality, so as to subject the corporation to tax on its stock or its property. The State was the only one that had power to tax corporations and this was fixed at 31 1/4 c per 100 dollars. The corporators knew that such was the law and the legislators exempted them for 7 years from the form of taxes then levied by the State.

If we consider the tax exemption as a contract, then the contracting parties cannot be presumed to have contracted

concerning a tax not even in existence, nor whose future existence was contemplated. As was said by Chief Justice Duckworth in the case of Thompson v. Atlantic Coast Line, 200 Ga. 856; 38 S.E. 2d 774:

"... Had it been intended that the corporation as a legal entity should forever be free from any sort or form of taxation except the one-half of one per cent as therein provided, it would have been a simple matter to have so provided and thus to have made clear such an intent. In failing to make clear such an intent, it is assumed that the legislature intended that the courts apply the rule of construction and restrict the exemption to the limits there stated, and never extend it by writing in something more.".

Doubt destroy hax exemption. When the entire section 15 of the Act of 1833 is read in connection with the last sentence, the intention of the legislature is extremely doubtful. Especially so as to whether it was intended that the corporate property should be exempted from ad valorem taxes of the subdivisions in perpetuity when the only exemption provided was an exemption from a State tax, the State at the time alone taxing stock of corporations, an intangible tax, the counties and municipalities having no such power.

ERRONEOUS ARGUMENT IN APPELLANTS BRIEF FILED IN SEPTEMBER, 1951

Erroneous Argument Relative to the Madison-Atlanta Branch

We quote the following argument from the Brief of Appellant filed in September 1951, page 38:

"Moreover, the original charter provided that the 'capital' of Appellant should be subject to tax only as provided in the charter. The courts have held that this meant the property in which the original capital was lawfully invested. Certainly the original capital

was lawfully invested in the Atlanta branch and therefore is subject to the special provisions for tax to the same extent as other property in which the capital was lawfully invested."

Counsel overlooks the fact that this branch was not built with the capital derived from the sale of stock, but was built from the earnings of the other portions of the road. In writing of this particular branch of the road Phillips'. History of Transportation, pages 243 and 247 says:

"The passing of the dividends in 1843-1844-1845 was a feature of the extension policy. Very few shares were salable during the hard times. The earnings of the road together with the proceeds of nearly \$700,000 in 7 per cent bonds, were all devoted to building the road to Atlanta. The route thither, especially in the neighborhood of Stone Mountain, was more rugged than that in the eastern district and yet was not on the whole unfavorable. The cost of the extension, with a T-rail of about forty pounds to the yard, was estimated at \$11,366 per mile, and the actual cost did not greatly exceed the estimate."

(On page 247) "In its early years the company was fortunate in being able to pay as it went. To secure the Atlanta extension, it assumed a bonded debt of \$700,000, it is true, which in the following years it increased to above \$900,000 for the sake of equipment and road betterments. This burden, however, was not oppressive, upon a railroad of such heavy traffic and high earning capacity; and from 1852 the debt was steadily reduced by moderate appropriations from earnings.

According to this same authority it will be noted the net earnings of the road applied to this branch for the years 1843, 1844 and 1845 as given on page 245 were as follows: 1843, \$138,207.00; 1844, \$147,532.00; and 1845, \$154,538.00; a total of \$440,227.00.

This sum added to the \$700,000.00 bond issue was not capital stock and we contend has no exemption for that reason.

Intent of Legislature Shown by Charter of Middle Branch Railroad Company

The intent of the legislature not to grant tax exemption to this branch of railroad is conclusively shown in the act of 1836 Prince's Digest, page 368, creating the Middle Branch Railroad Company for the purpose of building a railroad from Madison to Atlanta which provided:

"Said company shall possess and enjoy all the rights, immunities, and privileges, which are, had, possessed and enjoyed by the Georgia Railroad and Banking Company."

This corporation never accepted the charter and the next year the charter of the Georgia Railroad and Banking Company was amended allowing it to build the road, but with the limitation of the immunities to the construction instead generally as in the Middle Branch Railroad Company charter.

The Taxability of the Madison-Atlanta Branch Not Made A Separate Issue in Wright v. Ga. R. R. Co. in the 216th U.S. 420

In that case a separate issue was not raised or argued as to the taxability of the Madison-Atlanta Branch as was that of the Washington Branch. The reasoning applied to the taxability of the Washington Branch shows unquestionably had a separate issue been raised as to the taxability of the Madison-Atlanta Branch in the above case, the Supreme Court would have held that branch taxable also.

Fallacious Argument Relative to the Branch Beyond Athens

We think counsel is in error in their argument, pages 32 and 33 of their brief, relative to the building of the branch beyond Athens.

The preamble of the act of 1835 read as follows:

"Whereas the people of the west have in contemplation to make a communication between the city of Cincinnati and the Southern Atlantic Coast by means of a railroad: and whereas the best route for said communication is believed to be through the State of Georgia: and whereas the building of the Georgia Railroad is now in progress and will be an important link in the line of said communication."

Section 2 of the act provides:

"... the continuation of said road beyond Athens, so as to connect with the Cincinnati road shall be steadily prosecuted as soon as the company shall have satisfactory evidence that the said connection can be formed."

That the company deliberately failed to construct this railroad as contemplated by the above preamble is clearly brought out in the case of The Union Branch Rail Road Company v. The East Tennessee and Georgia R. R. Co., 14 Ga. 327. We learn from that case that the last named company was incorporated by the State of Tennessee in 1835 and was later built through Tennessee, and in the direction of Cincinnati.

Appellant is still under obligations to build this line.

The following extract from page 229 in Phillips' "History of Transportation in the Eastern Cotton Belt," shows the route which was planned from beyond Athens, Georgia, which has never been built:

"Beyond Athens an extension was contemplated running just north of Lawrenceville, across the Chattahoochee, between the sources of the Tallapoosa and the Etowah, to the Coosa River and thence to the Tennessee at Decatur, whence a railroad was already reported to be building to the Mississippi at Memphis."

Erroneous Argument as to Eafonton Branch

We call attention of the court to pages 35 and 36 of the Brief of Appellant, referring to the Eatonton Branch, giving as authority the act of 1859. We quote from page 36 of Appellant's brief:

"... This clearly withdrew the right of the Georgia Railroad & Banking Company to build a branch to Eatonton."

We submit that counsel must have not carefully read the acts of 1833 and 1835 in connection with reading the acts of 1858 and 1859. The acts of 1833 and 1835 required the three branch roads to begin

"... at the point agreed upon as the termination of the Union road, or such point for the midde road as the stockholders may select; one running to Athens one to Eatonton..."

Union Point was the termination of the Union road. The act of 1858 authorized this company to

"extend the Eatonton branch of their road from Greensboro or Madison, or from any point between those places to the town of Eatonton."

There is no indication that the company ever accepted the provisions of this act. Apparently, they did not for the very next year the legislature repealed this act, which left the company just where they were before the enactment of the 1858 act—still obligated to build this railroad from Union Point to Eatonion.

There is still no railroad from Eatonton to Madison or to Union Point.

Appellant admits its failure to construct the railroads required by the charter. It was the clear intention of the legislature that the company should construct a railroad to Eatonton, and from Athens to the Tennessee line. It gave the company the exclusive right for 36 years, approxi-

mately until 1876, to build the roads contemplated. It gave this company the exclusive monopoly for 36 years to construct all railroads, within 20 miles of this road and these towns. In the charter it repealed an act which would have otherwise given another corporation the right to construct a railroad to Eatonton. The building of these railroads was the purpose for which the corporation was created; the obligation to construct the branch to Eatonton was the moving consideration for the repeal of the act authorizing another corporation to build the road. There can be no room for doubt that it was both expressed and implied in the charter that it was the intention of the legislature and the incorporators that these roads would be built. Any tax exemption granted was done as the consideration for the construction of all these roads. Had the road been built to the Tennessee River as provided, Athens would have been the railroad center of Georgia. Had the road to Eatonton been built as required by the charter, that town would not have been without a railroad for so many years. The corporation flagrantly violated the very terms for which it was created.

The sanctity of a contract is not guaranteed by the Federal Constitution where the complaining party has not complied with the condition imposed upon it by the contract.

Respectfully submitted,

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APPENDIX

State of Georgia In Superior Court of Richmond County
Richmond County
No. 6227

GEORGIA RAILROAD & BANK-ING COMPANY.

Appellant

VS

CHARLES D. REDWINE, REVENUE COMMISSIONER, Appellee

APPEAL FROM THE ASSESSMENT OF AD VALOREM TAXES AND DENIAL OF PROTEST.

ORDER

The above and foregoing stated case coming on to be heard, after both oral and written arguments by all parties were had, and after a careful and thorough study of all the questions involved, the Court makes the following observations and decision:

In rendering a decision in this case involving questions of such grave importance, the Court deems it fit and proper to set forth some fundamental principles upon which it is based so as to leave no doubt as to the meaning of this decision.

The State cannot be sued without its consent, or a waiver thereof; and no power has ever existed in the General Assembly of Georgia to part with or limit the essential prerogatives of sovereignty without the consent of the people, and the Attorney General has no such authority as to waive this immunity except by Legislative enactment. And judgments heretofore rendered in such suits without such authority cannot now be pleaded as binding on the State, either as res adjudicata, or as an estoppel. This is specially so when the State was not a party, had not consented to be a party, nor waived its immunity in said suits.

Therefore, the construction and adjudication of the rights under the Charter, and several amendments thereto, of the Georgia Railroad & Banking Company are now open for consideration and decision. In order to determine all the eights of both parties in the case at bar, it is neressary to have an overall picture of all the Acts of the Legislature under the Constitution of 1798 by which said Corporation was created.

The Constitution of 1798 declared the territorial and jurisdictional rights of the citizens of Georgia, and defined and limited the powers of the Legislature to contract or alienate them only by their consent. All powers, duties and privileges of every agency of government are derived from the Constitution, and no Legislature has the right or power to contract, divest itself, or its successors, of any of the rights of sovereignty, especially its very life-blood-taxation, unless that power of disposition is given in clear, unequivocal, definite and certain terms by its Constitution, or by implication equally as clear. If one Legislature could contract and convey any one of the powers of sovereignty of the State so as to deny itself, and its successors, the free exercise of this power, all others might be so aliened, thus destroying and defeating the very object and purpose of Constitutional Government and depriving the people of their sovereignty without their consent.

No Legislature is presumed to have relinquished the State's sovereignty unless the intention so to do is definitely and clearly expressed, and if there is any reasonable doubt existing in regard to its relinquishment, such doubt is fatal to it, as all doubts are to be resolved against such presumption. Even where an exemption exists, it should be rigidly scrutinized and never permitted to extend either in scope or duration, beyond those clearly and definitely expressed. All grants of powers and exemptions of powers to corporations are contained in their Charters and ought to be strictly construed and their obligations to be strictly performed.

It is stipulated in the case at Bar that the Corporation never constructed two branches of its road as required by

its Charter and amendments thereto, to-wit: one running from the main line to Eatonton, and the other running from Athens to some point on the Tennessee River.

The Legislature, by an Act approved December 21, 1833, incorporated the Georgia Railroad Company for and during a term of thirty-six years and provided certain rights and powers and duties in same, and among which were those contained in Section 15, about which there has been, and still is, much controversy as to its scope and duration of powers. Section 15 reads as follows:

"The exclusive right to make, keep up and use the Railroads and transportations, authorized by this Act. shall be for and during the term of thirty-six years. · to be computed from the time when the said Road from Augusta to either of the points hereinbefore designated. shall be completed for transportation: Provided, That the subscription of stock or shares of said Company to the amount of at least five thousand shares as aforesaid, be filled up within six months from the passing of this Act, and the work from, or between Augusta, and either of the places hereinbefore first mentioned. be commenced within two years and be completed within six years after the five thousand shares shall be subscribed. And after said term of thirty-six years shall have elapsed, though the Legislature may authorize the construction of other Railroads, for the trade and intercourse contemplated herein: Nevertheless, The Georgia Railroad Company shall remain and be incorporate, and vested with all the estate, powers and privileges as to their own works herein granted and secured, except the exclusive right to make, keep up, and use Railroads over and through such parts of the country, that shall so have expired by the foregoing limitations; but the Legislature may renew and extend that exclusive right, upon such terms as may be prescribed by law, and be accepted by the said incorporated Company. The stock of the said Company and its

Branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said Kailroads, or any one of them; and after that, shall be subject to a tax not exceeding one-half per cent. per annum on the net proceeds of their investments."

This Section will be later referred to in more detail. ..

The Legislature, by an Act approved December 18, 1835, provided, "That the stockholders of the Georgia Railroad Company, and such other persons as shall take stock under this Act, and their successors and assigns, shall hereafter be a body corporate by the name and style of the Georgia Railroad and Banking Company," stipulating who should be the officers of the new corporation until the next annual election thereafter. It granted to this new corporation the right to establish an additional enterprise (banking), for a period of twenty-five years, unless forfeited, and provided by Section 13 of said Act that the Act of 1833 shall remain in full force and effect "except where it conflicts with the provisions of this Act." Then follows Section 14, as follows:

"And be it further enacted, That all the acts done and contracts made by the Georgia Railroad Company are hereby declared to be of binding efficiency on the Georgia Railroad and Banking Company; and all the rights to property acquired by the Georgia Railroad Company, of whatsoever nature or kind the same may be, shall pass to and be vested in the Georgia Railroad and Banking Company as fully and completely as they were vested in the said Georgia Railroad Company."

It should be noted, however, that the Legislature had already, by an Act approved December 18, 1835, created the Georgia Railroad and Banking Company and transferred, by Section 14, "all the rights to property acquired by the Georgia Railroad Company"; then on December 22, 1835, just four days after, the Georgia Railroad Company was authorized to construct, build and erect a branch of

said railroad to Warrenton without the delay contemplated in the Charter, "or may authorize the same to be done by others," thus showing that the Georgia Railroad Company was still seeking to build another road in the territory in which they had exclusive rights.

The aforesaid Sections 13 and 14 of said Act of the Legislature of 1835 is conspicuous by the very absence of any transfer or any attempt to assign any immunity from the Georgia Railroad Company to the new corporation (Georgia Railroad and Banking Company), with a new name, new parties and a new enterprise. However, by an Act of the Legislature in 1837, this new corporation was granted the privilege to construct a railroad from Madison to the State Railroad (Atlanta), under the same rights, powers and immunities as had been given to the Georgia Railroad Company in constructing its road from Augusta to Madison. Said privilege, "shall extend to and regulate the construction of said extended road . . . in the same manner and to the same extent and for the same purposes and uses as the same has been used and applied to the Georgia Railroad and its branch from Augusta to Madison," and specifically designated that "this authority is a privilege." "A privilege is never construed to be a contract, and can be withdrawn at the will of the Legislature."

Section 15 of the Act of 1833 is vague and uncertain. In said Section, the Legislature was dealing, as a whole, with certain definite periods of time from the passage of said Act, such as: six months period in which to obtain finances; a two-year period in which to begin work; a six-year period to complete it; a thirty-six-year period to make, keep up and use the railroad, and a seven-year period of complete tax exemption. The thirty-six year exclusive period was to begin at one and the same point of time as the seven-year tax exemption period was to begin, because the thirty-six year exclusive period was to begin when one of the railroads was "completed for transportation," and the taxation period

"was to begin from and after the completion of any one of them (said railroads)."

And now we some to that clause about which there is so much controversy as to its meaning, "The stock of the said Company and its Branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said Railroads, or any one of them; and after that, shall be subject to a tax not exceeding one-half per cent. per annum on the net proceeds of their investments."

Unquestionably the words "and after that" would mean a period of time beginning after the expiration of the seven year tax exemption period. The meaning as to when in point of time and for how long the method of taxing the stock at "one-half of one per cent." shall extend, is the very crux of the controversy, and if you treat the language "and after that" as a part of a contract in Section 15, it would benecessary to declare it void for uncertainty, and the prohibition as to the impairment of contracts would not apply in the construction thereof. The fairest and most reasonable construction to be placed upon said Section is that the thirtysix year "exclusive period to make, keep up and use the Railroads and transportations" can be and does mean an all "inclusive period" as used in regard to taxation. It would be unthinkable to construe the words "and after that", (the seven year tax exemption period) to mean for the remainder of eternity binding all posterity and its Legislatures. If the Legislature had intended for it to have extended beyond the thirty-six year period, there were ample words of clear, definite, unequivocal and unmistakable meaning, with which to have expressed themselves on such a grave and important . question. This is especially so since the Constitution of 1798 forbade the Legislature from passing a law repugnant to it and to limit its powers to contract or alien the rights of the citizens without their consent. If the Legislature had intended to have granted the said corporation a limited rate of taxation for the remainder of eternity, why deal in cestain and definite periods of time in regard to everything

else it could do under its Charter, including a part of the "taxation" period, and then use a sentence with a clause couched in such indefinite, uncertain and vague language as to another very important and substantial right claimed under the Charter, when for the first time throughout its Charter the subject of taxation was referred to, and if the Legislature so meant said words to have such meaning, it would have stated so, for "no rights are taken from the people or given to a corporation beyond those which the words of the Charter, by their natural and proper construction, purport to convey."

For the purpose of throwing light on the construction of said Section, we find on page 307 of Prince's Digest of Georgia Laws (2nd Edition), published in 1837, on the margin of this Section, these words: "Term of Charter, 36 years."

To make the construction and meaning of said Section 15 clear, the Court may best do so by the use of a very simple and homely illustration: Suppose "A," the owner of a large tract of land, leases the "exclusive rights" to "B" for a term of thirty-six months, to begin on the first of the year after certain improvement had been completed, and then provide rights in regard to the improvements after the expiration of the lease by a new agreement. Then for the first and only time that the question of rent is mentioned and referred to, is that "B" shall have his rent free for the first seven months beginning on the first of the year; "and after that" shall be subject to a rent not exceeding a percentage of the net earnings. Under such language, it would be unthinkable to construe that "B" would be liable for the stipulated rent for the remainder of his existence, rather than for the remainder of the thirty-six months expressed in the lease.

In further determining what the Legislature meant as regards the powers of taxation over this company's property, we find in an Act approved December 20, 1849 with the right to the Georgia Railroad and Banking Company

to increase its stock and build the Washington branch, with this proviso: That the amount of the increased stock of said company shall not be exempt from taxation as is secured to the present stock by the latter clause of the 15th Section of the Charter of said Company, but shall be subject to such tax as the Legislature may hereafter impose." Surely the words "shall not be exempted from taxation" as used were referring to the "seven year tax exemption" and was not granting said corporation complete tax exemption for any period, and definitely stated that the Legislature might impose any other method of faxation.

Then, by an Act of the Legislature, approved February 1, 1850, as a Supplement to the General Tax Laws, of Georgia it was provided that taxation on certain increased capital of said Georgia Railroad and Banking Company "no banking capital of said Company shall be exempt from future taxation; at the discretion of the Legislature, and the tax on net profits only be on the net profits of the Railroad." Thus, clearly showing that said Corporation recognized the power of the State to impose a different tax and it was extending the same period of taxation as to the Railroad stock as had been provided in the Act of 1833.

Then, by an Act approved December 11, 1858, the Legislature provided for an increase of capital stock and stated "That such additional stock shall be subject to such rate of taxation as the Legislature may assess upon the property of the people of this State," and this reserve right. under this Act in no case or under any circumstances to be construed to authorize any increase rate of taxation upon any other stock or property connected with said company other than the additional stock allowed by this Act," all of which was done well within the thirty-six year period.

Surely if said Corporation had thought it possessed an irrevocable contract as to the one-half of one per cent. taxation, they most certainly would not have asked for a continuation of this rate of taxation.

Almost immediately, after the termination of the thirty-

six year period, the people of Georgia adopted a new Constitution in 1877, which declared that all ax exemptions heretofore granted to be null and void, and also the people of Georgia, in their Constitution of 1945, declared that such exemptions that may have heretofore existed shall be null and void. It provided that taxation on all like property shall bear the same rate of taxation.

Hence, we are driven to the one and only logical conclusion that there is not now, nor ever was an irrevocable contract or agreement that said Railroad Company would forever enjoy a limited tax of one-half of one per cent. on its net earnings, and the people were well within their rights to withdraw such special privileges that may have been given to either of said corporations, as was done by the Constitution heretofore referred to.

THEREFORE, it is considered, ordered and adjudged by the Court, that the protest, together with the amendments thereto, set forth no valid reason why said Revenue Commissioner should not proceed to the collection of taxes as provided by law, and that the general demurrers of said Commissioner are hereby sustained, and the protest is hereby dismissed.

Thie 5th day of March, 1951.

G. C. ANDERSON J.S.C.A.C.

I, Victor Davidson, Special Attorney for Intervenors, Amici Curiae, certify that I have this day served a copy of the within brief on Hon, Eugene Cook, Attorney General of Georgia, Counsel for Appellee, and on Hon. Robert B. Troutman, Hon. Furman Smith, and Spalding, Sibiey, Troutman & Kelly, Counsel for Appellant, by mailing copies of same to their addresses.

This _____day of November, 1951.

VICTOR DAVIDSON
Special Coinsel for Intervenors,
Amici Curiae